

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-1941
Appendix-original P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff, Appellee

VS.

NICHOLAS D. ZINNI ET AL,
Defendant, Appellant

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPENDIX TO
BRIEF FOR DEFENDANT-APPELLANT
(From Judgment and Sentence)

By His Counsel,

C. Thomas Zinni
53 Mount Vernon Street
Boston, Massachusetts 02108

Charles P. Ferland
275 North Main Street
Danielson, Connecticut 06239

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PAGINATION AS IN ORIGINAL COPY

RELEVANT DOCKET ENTRIES

[Criminal No. H-524]

UNITED STATES OF AMERICA

VS.

NICHOLAS D. ZINNI ET AL

Nicholas D. Zinni--C. Thomas Zinni
53 Mount Vernon Street
Boston, Massachusetts 02108
Telephone--(617) 523-3245

1973
June, 14

The Grand Jury at Hartford returned....Indictment charging violation of 18 U.S.C. 241 in Ct. I...18 U.S.C. 1503 in Ct. II... 18 U.S.C. 884 (h) (1) in Ct. III....

25 Defendant Zinni....Plea of not guilty entered on 3 counts.

29 The following motions were filed by defendant Zinni.

- (1) Motion of the Defendant to Take a Poll.
- (2) Motion to be Furnished with Evidence Favorable to the Accused.
- (5) Motion for list of Names and Addresses of Witnesses Who Were Summoned.
- (6) Motion of the Defendant for Inspection of Grand Jury Minutes.
- (7) Motion to Dismiss for Prejudicial Publicity.
- (8) Motion of the Defendant to be Furnished with Statements of Promises, Rewards of Inducements.
- (9) Motion of the Defendant for the Production of Police Department Reports.
- (10) Motion to Dismiss.
- (11) Defendants Motion for Severance.
- (12) Defendant's Motion to be Furnished with Criminal Records and Probation Records.
- (13) Motion to Inspect Exhibits presented to the Grand Jury.
- (14) Motion of the Defendant to Inspect Evidence.

- (15) Motion for Copy of Statements.
- (16) Motion to Inspect Statements of United States Witnesses.
- (18) Motion to be Furnished with Statements concerning Identification.
- (19) Motion to Inspect Photographs.
- (20) Motion for a Change of Venue.
- (21) Motion for Discovery and Inspection.
- (22) Motion for Bill of Particulars.
- (23) Motion to Dismiss Indictment.
- (24) Motion to Dismiss (Counts I, II, and III)

Appearance of John A. O'Neill, Jr. entered and filed to represent the Defendant Zinni.

- July, 23 Hearing on 25 calendar motions:
- 25 Response of United States to Defendant Zinni's Motion to Dismiss, filed.
- 30 Memorandum in Support of Defendant Zinni's Motion to Dismiss, filed.
- Aug., 6 The following endorsements entered on Defendant Zinni:
- (1) Motion of the Defendant to Take a Poll, "July 23, 1973 motion of the Defendant Zinni to take a poll is withdrawn in open court, So ordered, " (Clairie, J.) m-8/10/73
 - (2) Motion to be Furnished with Evidence Favorable to the Accused, "July 23, 1973 The Defendant Zinni's motion to be Furnished with Evidence Favorable to the Accused through the conclusion of trial was agreed to by counsel for the Government, provided the obligation was limited to the requests of Brady v. Maryland (373 U.S. 83, 1962), and it was so mutually agreed; so ordered." (Clairie, J.) m-8/10/73
 - (5) Motion for List of Names and Addresses of Witnesses Who Were Summoned to Testify before the Grand Jury, "July 23, 1973 Motion Denied; so ordered" (Clairie, J.) m-8/10/73
 - (6) Motion of the Defendant for Inspection of Grand Jury Minutes, "July 23, 1973 Motion to Inspect Grand Jury Minutes is denied; so ordered. It was agreed by counsel that witnesses' testimony would be available at 9:00 a.m. on date testimony was to be offered at trial." (Clairie, J.) m-8/10/73

- (7) Motion to Dismiss for Prejudicial Publicity, "July 23, 1973 motion denied; so ordered." (Clairie,J.) m-8/10/73
- (8) Motion of the Defendant to be Furnished with Statements of Promises, Rewards of Inducements, "July 23, 1973 motion denied; except that it was agreed by counsel that at 9:00 a.m. on the date such witness would be called at trial, this information would be furnished the defendant's counsel; so ordered." (Clairie,J.) m-8/10/73
- (9) Motion of the Defendant for the Production of Police Department Reports, "July 23, 1973 motion denied; except that the Government will have available all relevant police reports for review by counsel at 9:00 a.m. on the day such evidence is to be used at trial; so ordered." (Clairie,J.) m-8/10/73
- (10) Motion to Dismiss, "July 23, 1973 motion denied; so ordered (Clairie,J.)" m-8/10/73
- (11) Defendant's Motion for Severance, "July 23, 1973 the Court's ruling on the severance motion is held in abeyance until the time of trial; so ordered." (Clairie,J.) m-8/10/73
- (12) Defendant's Motion to be Furnished with Criminal Records and Probation Records, "July 23, 1973 the motion denied; except that the Government shall furnish the criminal records of prospective Government witnesses at 9:00 a.m. on the day such witnesses testimony is to be offered at trial; so ordered." (Clairie , J.) m-8/10/73
- (13) Motion to Inspect Exhibits Presented to the Grand Jury, "July 23, 1973 motion denied; so ordered." (Clairie, J.) m-8/10/73
- (14) Motion of the Defendant to Inspect Evidence, "July 23, 19-73 motion denied; except that the Government shall make available to the defendant any pieces of evidence, on which the Government has performed scientific tests or experiments, which evidence will be offered at trial, it shall be made available at the office of the U.S. District Atty. at Hartford at a time mutually agreeable to counsel; so ordered." (Clairie,J.) m-8/10/73
- (15) Motion for Copy of Statements, "July 23, 1973 motion is granted, as to any statement, oral or written, of the defendant, which the Government will rely on or introduce at the trial; so ordered." (Clairie, J) m-8/10/73
- (16) Motion to Inspect Statements of United States Witnesses, "July 23, 1973 motion denied." (Clairie,J.) m-8/10/73

4.

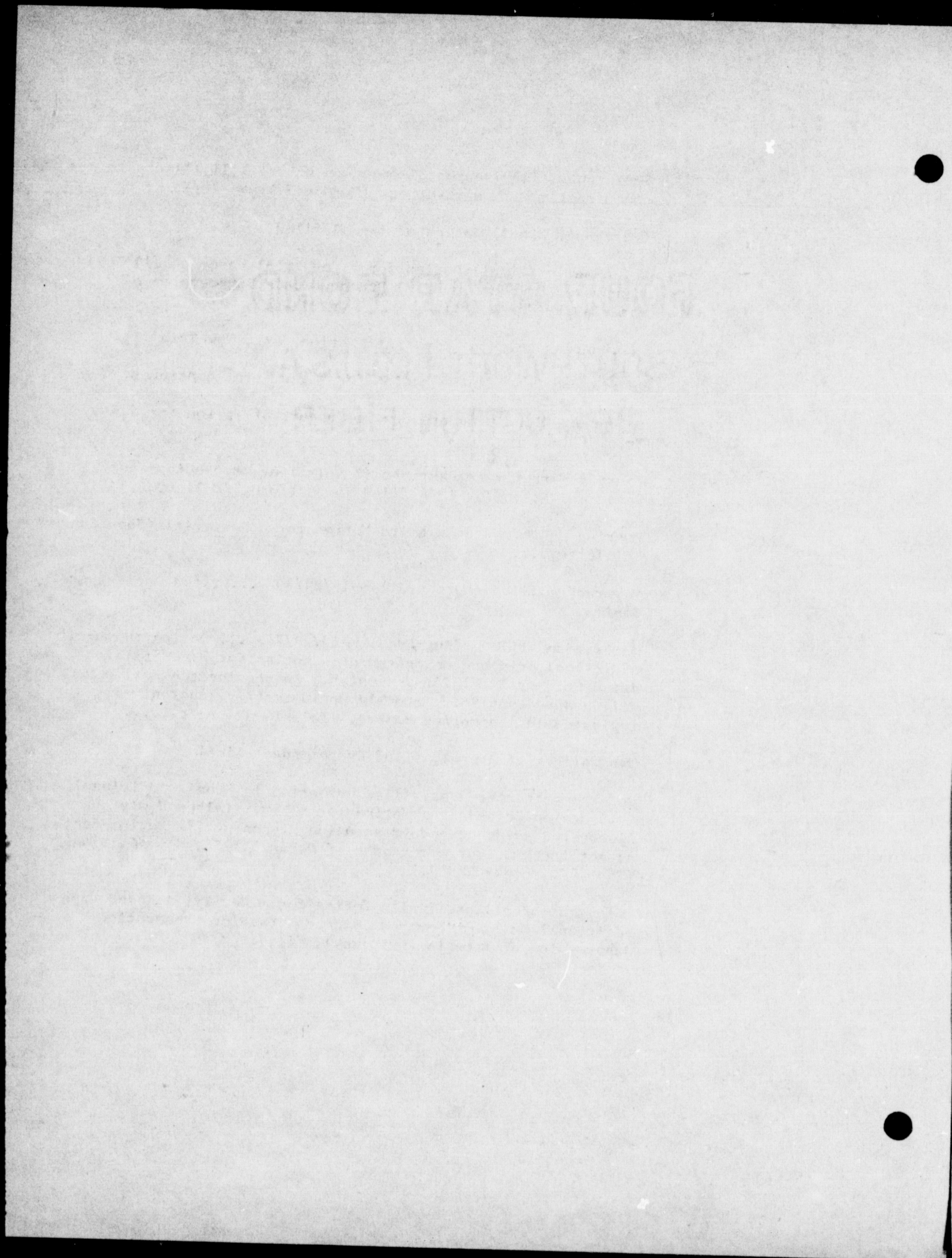
- (18) Motion to be Furnished with Statements concerning Identification, "July 23, 1973 this motion was withdrawn at the hearing on said motion." (Clairie, J.) m-8/10/73
- (19) Motion to Inspect Photographs, "July 23, 1973 motion denied." (Clairie, J.) m-8/10/73
- (20) Motion for Change of Venue, "July 23, 1973 motion for change of venue was withdrawn in open court at the time of the hearing on the motion." (Clairie, J.) m-8/10/73
- (21) Motion for Bill of Particulars, "July 23, 1973
(1) The Government agreed to furnish the Defendant Zinni the material sought in paragraph #10, only as to materials seized from him and not the other defendants.
(2) Paragraphs # 4, 5, 6, 7, 11 and 12 are denied.
(3) Paragraphs #1, 2, 3, and 8 are not available, because they do not exist.
(4) Paragraphs #9, 13, 14, 15, 16, 17, and 18 were withdrawn." (Clairie, J.) m-8/10/73
- (22) Motion to Dismiss Indictment, "July 23, 1973 the motion of the Defendant Zinni to dismiss the indictment is denied; so ordered." (Clairie, J.) m-8/10/73
- (23) Motion to Dismiss, "July 31, 1973 motion of the Defendant Zinni to dismiss the indictment is denied; so ordered." (Clairie, J.) m-8/10/73
- (24) Motion ofr Discovery and Inspection, "July 23, 1973
(1) Paragraphs #1, 2, 4, 18, and 19 (limited to Brady v. Maryland) are granted.
(2) Paragraphs #3, 5, 6, 7, 8, 10, 11 and 17 are denied.
(3) As to paragraphs #12, 13, 14, 15, and 16 the Government reports there are none.
(4) Paragraph #9 shall be provided at 9:00 a.m. on the date of trial, when the witnesses testimony will be offered; so ordered." (Clairie, J.) m-8/10/73
- 21 Memorandum in Support of Defendant Zinni's motion to dismiss, filed.
- Sept. Government's Response to Motion to Dismiss Count I, filed.
- 19 Defendant Zinni's motion to dismiss , filed.

- Oct. 9 Motion to Withdraw Appearance on Behalf of Nicholas Zinni, filed by Attorney O'Neill. "Defendant Zinni's Motion to Dismiss, Decision reserved." (Clairie, J.) 10/10/73
- 18 Defendant's Motion (Nicholas Zinni) to Dismiss, filed along with affidavit of John O'Neill, Jr., Esquire
- 19 Endorsement entered on Motion to Withdraw Appearance on Behalf of Nicholas Zinni; "Oct. 19th, 1973 Motion of Atty. O'Neill to withdraw is denied; so ordered." (Clairie, J.) m-10/23/73
- Habeas Corpus filed on N. Zinni--Hearing on Motion to Withdraw Motion to Withdraw denied Atty. O'Neill makes motion for Severance and advised by Court no action will be taken and motion should be renewed at a later time--Atty. O'Neill asked Court's permission to interview Mr. Zinni as he is being held in protective custody by State authorities--court advised Mr. Coffey, he should notify prison authorities that Mr. O'Neill may see his client--Motion of the U.S. to file in-camera statement of William Marrapese. (Sept. 13)
- Guillette Motion to Suppress Testimony of John Housand and John Daniels along with Affidavit and Memorandum in Support of Motion to Suppress Testimony of John Housand and John Daniels filed...
- Endorsement entered on Motion to Suppress Testimony of John Housand and John Daniels, "The defendant Guillette's Motion to Suppress the Testimony of John Housand and John Daniels is denied. So ordered." (Clairie, J.)
- 24 Atty. Bucci renews Motion for Severance, Defendant Marrapese and Zinni are severed from cases of Defendants Joost and Guillette.
- 1974
- Jan. 14 Defendant Zinni's Motion to Sever and Motion for Change of Venue filed.
- 28 Endorsements entered on Defendant Zinni's Motion to Sever and Motion for Change of Venue, "Jan. 28th 1974 final action over one (1) week when co-defendant Marrapese and Mr. Zinni shall appear with counsel; so ordered." (Clairie, J.) 1/30/74
- Feb. 4 Defendant Zinni's Motion to Sever-- Denied reserved for Judge who will try case...
- Apr. 24Court assigned trial date of May 21, 1974 at Waterbury, Connecticut before Judge Murphy for both defendants (Zinni and Marrapese).
- May 1 Defendant Zinni's Motion to Sever, filed.

- 6 Hearing re Defendant Zinni's Motion to Sever--Decision reserved (Clairie, J.) m-5/7/74
- 8 Endorsement entered and filed on Defendant Zinni's Motion to Sever, "May 7th 1974 Motion denied, without prejudice to its being renewed prior to trial before presiding trial Judge; so ordered." (Clairie, J.)
- 28 Jury Trial: (Zinni and Marrapese) Attorney Coffey moves for admission of Attorney Ferland (as counsel for Defendant Zinni) for purpose of this case.
- 29Defendant Zinni orally moves for severance of trial, denied.
Defendant Zinni moves that admission of evidence (Brooklyn Jail tapes) exclude Defendant Zinni or renews Motion to Sever--denied with exceptions.
- June 4Defendant moves to Dismiss charge against Defendant Marrapese under Rule 29 (a)--Defendant moves to Dismiss charge against Defendant Zinni.....motion denied....
- 5 Defendant Zinni renews Motion to Sever, decision reserved--Defendant's Motion to Sever--noted and denied (with exceptions)
- 6 Defendant Zinni's Request to Charge, filed--Defendant Marrapese's Request to Charge, filed....Defendant Marrapese moves for Judgment of Acquittal pursuant to Rule 29 (a), Defendant Zinni adopts motion and arguments of Defendant Marrapese--all motions denied with exceptions of each counsel.
- 10Court rules on Request to Charge.
- 11Exceptions to charge noted by Defendant Zinni
- 12Defendant Zinni moves for severance--denied....jury returns to courtroom with a verdict of Guilty on all three counts as to each defendant....
- 18 Defendant Zinni's Motion for New Trial, Motion to Set Aside Verdict, and for Judgment of Acquittal, and Motion to Arrest Judgment, filed.
- 26 Hearing held on Defendant Zinni's Motion for New Trial, Motion to Set Aside Verdict and For Judgment of Acquittal; Motion to Arrest Judgment, all motions denied.....
- Disposition: (3 Counts) Defendant Zinni--imprisonment for the remainder of his life on Count I, five years imprisonment on Count II, and ten years imprisonment imposed on Count III.

Sentence of imprisonment imposed on Counts I,II,III are to run concurrently with each other. (Murphy,J.) m-6/28/74

- July 5 (Defendant Zinni) Notice of Appeal filed.
- 19 Defendant's (Zinni) Motion for a New Trial based on (1) Newly Discovered Evidence and (2) Prosecution's Suppression of Material Evidence, filed.
- Sept. 5Hearing held on Defendants Motion for a New Trial.
- 6 Hearing on Defendant's Motion for a New Trial continues.
- 16 Defendant Zinni's memorandum in Support of Motion for a New Trial filed.
- 30 Court reporter's transcripts (2 Vols.) of proceedings held on September 5, and 6, 1974 filed in Hartford, (Collard,R.)
- Oct. 3 Hearing on Defendant's third Motion for a New Trial (Joost and Guillette)....
- 24 Memorandum filed (Murphy,J.) m-10/29/74 ".....the motions are denied."
- 29 Memorandum, filed, (Murphy,J) m-10/29/74 "... motion to submit additional evidence on defendant's motion for a new trial, dated October 22, 1974, is denied. In denying the motion we will assume that Sgt. McDonald would testify substantially as indicated in the motion papers. This is an order."....
- Nov. 4 Two Notices of Appeal, filed by Defendant Zinni
- 11 Endorsement entered and filed on Motion to Submit Additional Evidence on Defendant's Motion for a New Trial on Newly Discovered Evidence and Prosecution Misconduct." Motion denied as set forth in our memorandum of Oct. 29,1974, Nov. 6,1974 (Thos. F. Murphy USD J.)
- 18 Defendant-appellant Zinni's Motion for a New Trial Based Upon Additional Newly Discovered Evidence, (and/or Prosecution Suppression of Material Evidence), filed.



UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA

v.

DAVID GUILLETTE, ROBERT JOOST,
WILLIAM MARRAPESE, NICHOLAS ZINNI

)
)
) CRIMINAL NO. H524
)
)

COUNT ONE

From on or about May , 1972 until on or about September 29, 1972 in the District of Connecticut, and elsewhere, DAVID GUILLETTE, ROBERT JOOST, WILLIAM MARRAPESE, and NICHOLAS ZINNI, the defendants herein, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly did combine, conspire, confederate and agree together and with each other to injure, oppress, threaten and intimidate one Daniel Lapolla, a citizen of the United States of America, in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States and because of him having exercised said right and privilege, to wit, the right and privilege to give information to the proper authorities concerning violations of the gun control laws of the United States, and the right and privilege to be a witness in a judicial proceeding in the United States District Court for the District of Connecticut, to wit, the case of United States v. William Marrapese, Nicholas Zinni, Robert Joost and David Guillette, Criminal No. H-264 ; and it is further alleged that this combination and conspiracy resulted in the death of Daniel Lapolla.

All in violation of Section 241, Title 18, United States Code.

COUNT TWO

On or about September 29, 1972, in the District of Connecticut David Guillette, Robert Joost, Nicholas Zinni and William Marrapese unlawfully, wilfully and knowingly endeavored, by force and violence, to influence, intimidate and impede Daniel Lapolla, a witness in a Court of the United States, a witness in the matter of the United States v. William Marrapese, Nicholas Zinni, David Guillette and Robert Joost, Criminal No. H-264, which was before the United States District Court for the District of Connecticut.

All in violation of Title 18, United States Code, Section 15

49
COUNT THREE

On or about September 29, 1972, in Orisco, Connecticut
In the District of Connecticut, David Guillette, Robert Joost,
William Marrapese and Nicholas Zinni did wilfully, unlawfully and
knowingly use an explosive, that is, a dynamite bomb, to commit
a felony prosecutable in a court of the United States, said
felony being the Influencing and Injuring by force a witness in a
Court of the United States, i.e. one Daniel Lapolla and the
Influencing and Injuring of said Daniel Lapolla for having so
testified in a proceeding of the United States, thus impeding,
obstructing and Influencing the due administration of justice, in
violation of Section 1503, Title 18, United States Code.

All in violation of Title 18, United States Code,
Section 844 (h)(1).

A TRUE BILL

Foreman

STEWART H. JONES

UNITED STATES ATTORNEY

PAUL E. COFFEY
SPECIAL ATTORNEY

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,
PLAINTIFF, APPELLEE,

v.

**WILLIAM MARRAPESE,
NICHOLAS ZINNI,**
DEFENDANTS, APPELLANTS.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR DEFENDANTS-APPELLANTS

By Their Counsel,
ANDREW A. BUCCI
(William Marrapese)
9 Steeple Street
Providence, Rhode Island
JOHN A. O'NEILL, JR.
(Nicholas Zinni)
9 Steeple Street
Providence, Rhode Island

of two (2) other persons in addition to these two (2) Defendants, appear thereon as Defendants . . . you will concern yourself only with the charges against the Defendants William Marrapese and Nicholas Zinni; they are the only two persons being tried at this time; and you should not speculate or draw any inference whatsoever concerning the disposition of the cases of the other two defendants or the status of those cases."

The only mention of Joost and Guillette being in the case, the only way that the jury could have concluded that they performed overt act three was to take the indictment itself as proof of a material element.

It might be submitted by the Government that the concealment of the M-16 rifles, independently proved, is the very essence of the third overt act. This may be true but who put them there? Was there proof that it was a member of the conspiracy? The answer is a simple — NO!

For the reasons set forth, both Appellants urge that this Honorable Court enter an order to dismiss the conspiracy count or in the alternative, grant them a new trial.

QUESTION

4

The trial court erred in admitting the tape recordings containing the Appellants' voices into evidence because they were a product of an unconstitutional invasion of privacy and otherwise unconstitutional.

The leading case cited by the Government for the admission of the type of testimony in question is *United States v. White*, 401 U.S. 745 (1971). In this case, a plurality of the court rejected Fourth and Fifth Amendment

arguments. It should be pointed out that *White* was a Seventh Circuit case and when considering this matter after the *White* decision was handed down, a district court justice sitting within the Seventh Circuit refused to follow the plurality's reasoning in the Supreme Court's opinion; but rather adhered to the Seventh Circuit's opinion 40 S1, F.2d 838, see *Bakes v. United States*.

It would seem that Judge Wills' decision in the *Bakes* case was well-founded for action by an equally divided court does not constitute precedent. *United States v. Pink*, 62 S. Ct. 552, 315 U.S. 203. It is therefore submitted that the *On Lee* and *Lopez* doctrines have been overruled by *Katz* and *Berger*. See, 52 Boston U.L.R. 831.

The defense, however, would urge additional grounds other than the Fourth and Fifth Amendment areas argued in *White*. On January 22, 1973 the Supreme Court handed down *Roe v. Wade* and *Doe v. Bishop*. In both cases, the court indicated that the right of privacy was covered by the Ninth Amendment. The defense in the instant case would agree and urge that this right of privacy was infringed upon in the instant case.

The *Roe* and *Doe* cases involved abortion statutes and were at least partially based on Judge Goldberg's concurring opinion in *Griswold v. Connecticut*, 381 U.S. at 486 (a birth control case). Opponents of this Ninth amendment argument may argue that the aforementioned cases involve special areas of privacy. That argument can perhaps be answered best with a question. Is not a man entitled to talk freely in his own home or place of business?

The Government will answer, indeed, Mr. Coffey already has answered on page 142 of the transcript of motions heard by this court on January 29, 1973.

"I would call the court's attention particularly to the Hoffa case, *United States v. Hoffa* — I believe it is *Hoffa v. United States* — in which the Supreme Court said when a person is engaged in criminal activity, or in this case criminal conversation, he is not entitled to assume that the particular conversation is not being monitored by a third party. And he is not entitled to assume that the person to whom he is giving the criminal conversation is not going to turn it over to law enforcement officials."

For the court's purposes, the *Hoffa* case may be found at 385 U.S. 293.

It should be pointed out that the *Hoffa* case, along with *Lewis v. United States*, 385 U.S. 206 and *Lopez v. United States*, 373 U.S. 427, were all cases following the *On Lee* doctrine (see *On Lee v. United States*, 343 U.S. 747 (1952)). As many Supreme Court justices stated that these cases were overruled by *Katz v. United States*, 389 U.S. 347 and *Berger v. New York*, 388 U.S. 41 as did say that *On Lee* was still the law. Therefore, when the Government makes such a pronouncement relative to the *Hoffa* case it assumes a position which even the Supreme Court cannot agree upon.

Indeed a conspiracy is said to be an agreement between two or more persons to accomplish together a criminal or unlawful act or to achieve, by criminal or unlawful means, an act not in itself criminal or unlawful. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124. Thus, it would not seem that *Hoffa* could apply to Mr. Zinni without some showing of guilty knowledge on Mr. Zinni's part when he asked the question — "He wants to by the rifles?". This was Mr. Zinni's only connection with the case. It would seem that, in order for the doctrine in *Hoffa* to apply, one must first assume that the conversation was, in fact, criminal in nature.

This assumption requires an inference of guilt. The defense submits that not only would such a conclusion violate the Fourth, Fifth and Ninth Amendments, but would also do violence to the First.

Mr. Zinni's six words are in the form of a question. To hold that on the state of the evidence, that this question sufficiently implicates Mr. Zinni so as to render a verdict of guilty, justifiably runs contrary to the concept of free speech and indeed the desire of the Government to stop criminal actions.

Does it not seem logical that if one were to enter a room where two acquaintances were engaged in a conversation and, after hearing part of their conversation, not being sure of the import of the words heard, he would ask a question, and upon receiving an answer, determine whether or not he wanted to continue or depart from the conversation? Does a man become guilty of conspiracy to commit prostitution when he asks a prostitute how much she charges, or does he so implicate himself when he agrees to the tariff? Does one who overhears acquaintances planning to commit a bank robbery become guilty of so conspiring by asking them the question — "Are you guys going to rob a bank?"? Does not the answer to the question and the asker's decision constitute the agreement needed for a conspiracy? Suppose in the foregoing examples the asker said to the prostitute — "No, your price is too high." or "You guys have to be crazy." and walks away. Was he part of the conspiracy? The foregoing are affirmative acts displaying one's unwillingness to participate in the conspiracy, but suppose one stands mute or walks away in silence? Can the mere fact that he asked the question have bound him inextricably in the conspiracy? The defense thinks not, and would urge the court to so rule.

QUESTION

7

That the court erred in admitting Government Exhibits 11 and 18 because there was no showing of consent on the part of Lapolla.

* The Government has the burden of proving at trial that the informant voluntarily consented to the illegal eavesdropping. *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788; *Wren v. United States*, 352 F.2d 617; *Simmons v. Bomar*, 349 F.2d 365; *Judd v. United States*, 190 F.2d 649; *Kovach v. United States*, 53 F.2d 639. Its burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. *Bumper v. North Carolina*, 391 U.S. 543, 88 S. Ct. 1788; *Amos v. United States*, 255 U.S. 313, 41 S. Ct. 266; *Johnston v. United States*, 333 U.S. 10, 68 S. Ct. 367; *United States v. Jones*, 292 F. Supp. 1001, 1008.

In the *Simmons* case supra, the petition brought a habeas corpus proceeding to test what he contended to be an illegal search and seizure. The court at page 366 said:

"Consent to search in order to be voluntary must be unequivocal, specific, and intelligently given, uncontaminated by any duress or coercion and is not likely to be inferred. *United States v. Como*, 340 F.2d 891 (CA 2). The Government has the burden of proving such consent has been given. *McDonald v. United States*, 307 F.2d 272 (CA 10). *Judd v. United States*, 190 F.2d 649.

In *United States v. Como*, 340 F.2d 891 (1965), Judge Kaufman of this Circuit rendered the decision. In that case, Como was working as a special employee of the Fed-

eral Bureau of Narcotics along with other agents. They were trying to make a case against one Cangiano. Simultaneously, though independently, two agents were investigating the same suspect. After hearing that an unidentified person had bought heroin from Cangiano, agents went to the hotel where the purchase was made to determine the identity of the purchaser. When Como entered the hotel and asked for his room key, the agents approached him. Como told them that he himself was an agent, but they did not believe him; and the agents refused to make a call confirming Como's identity until he acknowledged the presence of heroin. The agents then arrested Como and searched the room.

"at 893, we recognize . . . that consent to a search is not to be lightly inferred." *United States v. Viale*, 312 F.2d 595, 601 (2d Cir. 1963). The guidelines are clear. An accused's voluntary consent must be proven by clear and positive evidence. A consent is not a voluntary one if it is the product of duress or coercion, actual or implied. Moreover, to be voluntary, a consent must have been unequivocal, specific, and intelligently given. *United States v. Smith*, 308 F.2d 657, 663 (2d Cir. 1962) cert. den. 372 U.S. 906, 83 S. Ct. 717. See also *Channel v. United States*, 284 F.2d 217, 219 (9th Cir. 1960).

The trial court also adopted *United States v. McKeever*, 169 F. Supp. 426 as the law in this case. The seventh prong of the *Solomon* test adopted by McKeever is that the testimony elicited was freely and voluntarily made without any kind of duress.

For the reasons submitted, the Appellants urge this Honorable Court to grant them a new trial.

STATE

v.

William E. TELLA.

No. 73-83-C.A.

Supreme Court of Rhode Island.

June 12, 1974.

Defendant was convicted in the Superior Court, Providence and Bristol Counties, Gallant, J., of receiving stolen property, and he appealed. The Supreme Court, Joslin, J., held that information which may have been obtained in September, 1970, could not support issuance of search warrant in August, 1971.

Reversed and remitted.

Roberts, C. J., did not participate.

1. Criminal Law \S 1081(2)

Notice of intention to prosecute bill of exceptions filed before effective date substituting appeal for bill of exceptions in criminal cases, could be treated as notice of appeal, even though bill was not perfected.

2. Searches and Seizures \S 3.6

Information which may have been obtained in September, 1970, could not support issuance of search warrant in August, 1971.

3. Searches and Seizures \S 3.6(1)

Affidavit supporting issuance of search warrant must furnish issuing magistrate with sufficient facts to permit reasonable conclusion that property which is object of search is on premises at time of issuance.

1. Following the defendant's conviction and the filing of his notice of intention to prosecute a bill of exceptions, Rule 4(b) of our rules became effective. It substituted an appeal for

4. Searches and Seizures \S 3.6(2)

Without showing of probable cause for believing that property which is object of search is on premises at time of issuance of warrant, even the most convincing proof that property may have been on premises at some remote time in the past will not justify present invasion of privacy.

5. Searches and Seizures \S 3.6(1)

For purpose of determining timeliness or staleness of information presented to support search warrant, court would treat averments of affidavit as if they related to most remote date on which observations might have been made.

6. Searches and Seizures \S 3.5

Criminal rules of evidence do not bind magistrates when they pass upon probable cause for issuance of search warrant.

7. Searches and Seizures \S 3.6(2)

Existence of timely probable cause for issuance of search warrant should not turn on whether affidavit's verbs are cast in present tense or past tense.

Richard J. Israel, Atty. Gen., Donald P. Ryan, Asst. Atty. Gen., Edward E. Dillon, Jr., Sp. Asst. Atty. Gen., for plaintiff.

Raymond J. Daniels, Providence, for defendant.

OPINION

JOSLIN, Justice.

[1] This appeal arises from the trial and conviction of the defendant before a judge and jury in the Superior Court on three indictments, each of which charged him with receiving stolen property in violation of G.L. 1956 (1969 Reenactment) \S 11-41-2.¹ Because we find that the evi-

a bill of exceptions as the means of securing appellate review of criminal proceedings in the Superior Court. In these circumstances, we treat his notice of intention to prosecute a bill

dence upon which those indictments and convictions were based was the product of a search made pursuant to an invalid search warrant, we reverse.

On August 24, 1971, Sergeant Lionel J. Benjamin of the Rhode Island State Police presented a District Court judge with an application for a warrant to search certain premises owned by defendant and located at 731 Central Avenue in the town of Johnston. Annexed to the application was a four-page, single-spaced, typewritten affidavit wherein the sergeant states that on July 19, 1971, he met with an unnamed, reliable informant who gave detailed information about his participation in five "breaks," the first of which occurred on July 21, 1969, and the last on September 16, 1970. According to the informant, approximately \$143,000 worth of precious metals and other contraband stolen in those breaks was delivered at undisclosed times to defendant's residence in Johnston.

The affidavit further advises that the informant stated that "there is a precious metal scale located in the cellar portion of [defendant's residence] * * * and that there is also a large type service scale located in the back yard which is used by [defendant] to weigh said stolen precious metals and other contraband"; that in the rear yard of defendant's residence "there is a green cinder block type structure * * * which [defendant] uses for the purposes of melting stolen precious metals and that within said structure is kept molds, electric and gas melting pots"; that "each time" the stolen precious metals were taken to defendant's residence they would be "weighed and the weight would be recorded"; that in the cellar portion of defendant's residence is "an office in which the records of all transactions in

of exceptions as a notice of appeal, even though that bill was not perfected. *State v. Lombardi*, R.I., 319 A.2d 346 (1974).

2. The warrant describes the property or articles to be searched for as:

stolen precious metals and contraband are kept"; and that he (the informant) would then report to the Small State Coin Co., a Providence concern which was operated by defendant and his brother, where he would be paid for the stolen merchandise in cash.

During the slightly more than one month which intervened between these disclosures and the August 24th application for a warrant, the police conducted extensive independent investigations which verified what the informant had related about the breaks and the amounts involved therein. This investigation and verification made it possible for the sergeant to declare in the affidavit his belief in the informant's reliability.

On the strength of that affidavit, the District Court judge issued a search warrant on August 24, 1971. It particularly described defendant's cellar and adjacent cinder-block structure as the places to be searched and the above-mentioned records, scales, molds, and melting apparatus as the things to be seized.² It was executed on the next day, and the property seized included not only the articles described therein but also firearms, rugs, and electronic equipment which, at the trial, the state attempted to prove were stolen merchandise.

Following the return of the indictments, defendant moved to suppress the seized evidence on the ground that the search had been based on an illegal warrant. That motion was denied and the challenged evidence was thereafter admitted at the trial and provided the basis for defendant's conviction.

[2, 3] The defendant attacks the affidavit on the ground that by the time it was presented to the District Court judge, its

"Records & Files indicating purchases, sales & shipments of precious metals. Precious metal scales, precious metal molds, Gas & Electric melting parts [sic]. Books indicating value, purchase, sales transactions and shipments of precious metals."

contents had become so stale as to make it facially incapable of supplying the probable cause requisite to the issuance of a warrant. The success of that attack hinges upon whether the affidavit's contents furnished the issuing magistrate with sufficient facts to permit a reasonable conclusion that the property which was the object of the search was actually on the premises to be searched at the time the warrant issued.³

[4] That requirement demands a showing in the affidavit of " * * * facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210, 53 S.Ct. 138, 140, 77 L.Ed. 260, 263 (1932).⁴ Without that showing of timely probable cause, even the most convincing proof that the property to be seized may have been on the premises to be searched at some remote time in the past will not justify a present invasion of privacy. *Durham v. United States*, 403 F.2d 190, 193 (9th Cir. 1968).

Whether the sergeant's affidavit, which supported the issuance of the warrant in this case, measures up to these standards must be determined by viewing it "in a commonsense and realistic fashion," without insistence upon "technical requirements" and unhampered by a "grudging or negative attitude." *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746,

3. *Sgro v. United States*, 287 U.S. 206, 53 S.Ct. 138, 77 L.Ed. 260 (1932); *Murby v. United States*, 2 F.2d 56 (1st Cir. 1924); *Annot.*, 100 A.L.R.2d 525, §§ 5-7 (1965), including *Later Case Service*, and cases collected therein; *Mascolo, The Staleness of Probable Cause in Affidavits for Search Warrants: Resolving the Issue of Timeliness*, 43 Conn.B.J. 189 (1969), and cases cited therein.

4. The procedures described in the *Manual for United States Magistrates* (1972), issued by the Administrative Office of the United States Courts, explicitly states at pages 7-3 and 7-4 that:

"A search warrant should not be issued unless the showing made in connection with

321 A.2d—64½

13 L.Ed.2d 684, 689 (1965); *State v. LeBlanc*, 100 R.I. 523, 530-531, 217 A.2d 471, 475 (1966).

Here, the affidavit furnishes us with the dates of the informant's breaks, and it tells us what he observed when, following each break, he delivered the stolen goods to defendant's premises. But it does not advise us of the particular time when he made those deliveries and had an opportunity to observe the conditions he described to the sergeant.

Undated information of that character from an anonymous source would be fatal to the issuance of a warrant if the affidavit were also lacking in reasonably specific clues relevant to the issue of timely probable cause. *Rosencranz v. United States*, 356 F.2d 310, 318 (1st Cir. 1966); *Neely v. Commonwealth*, 269 Ky. 451, 107 S.W.2d 305 (1937); cf. *State v. Butts*, 97 R.I. 147, 151, 196 A.2d 415, 417 (1964). This affidavit, however, contains averments from which it can be concluded that the informant's observations must have been made within the time span which commenced on September 16, 1970—the date of the last break—and ended on July 19, 1971—the date of his disclosures to Sergeant Benjamin.

[5] True, the affidavit does not pinpoint when, in that time span, those observations were made. But we fill that gap in the same manner as do those courts

the application therefor clearly indicates probable cause that the property to be seized is actually at the place to be searched

"A showing to the effect that the property to be seized was at the place to be searched a substantial time before the application was made does not justify the issue of a search warrant, for the reason that during the intervening period the property may have been moved away. The facts must show that the property to be seized was known to be at the place to be searched so recently as to justify the belief that the property is still there at the time of the issuance of the search warrant."

faced with averments that observations were made "within" a specified period, that is, as if they occurred not throughout the duration of that time span, but on the most remote date within that span. *State v. Hoffman*, 516 P.2d 84 (Or.App.1973); Annot., 100 A.L.R.2d 525, 532-533 (1965), and cases collected therein. In this case that would be September 16, 1970, the date of the last break.

What we must determine, then, is the timeliness or staleness of the informant's September 16, 1970 observations when brought before the magistrate on August 24, 1971. We can turn to no hard and fast rule for the answer. *United States v. Guinn*, 454 F.2d 29, 36 (5th Cir. 1972). Instead, we must consider the particular facts of this case, taking into account not only the time differential, but also " * * * the nature of the criminal activity, the length of the activity, and the nature of the property to be seized * * *." *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972).

Here, to be sure, after each of the five breaks the informant observed equipment presumably used in promoting criminal activity by converting stolen precious metals into readily salable form. But the propriety of the issuance of the warrant depended upon the assumption of that equipment's continuing presence at the same location, and upon the further inference that the same criminal activity continued for the more than 11 months which intervened between the informant's September 16th observations and the August 24th issuance of the warrant.

[6] The rules of evidence which obtain at criminal trials do not bind magistrates

5. The state does cite *United States v. Guinn*, 454 F.2d 29 (5th Cir. 1972), where, owing to special circumstances, a lag of almost seven months was held not to be too great. The usual dividing line between what is stale and what is timely, however, is 30 days. See Annot., 100 A.L.R.2d 525, 534-42 (1965). This was recognized in *Schoeneman v. United*

when they pass upon probable cause. *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S. Ct. 1509, 1514, 12 L.Ed.2d 723, 729 (1964); *Draper v. United States*, 358 U.S. 307, 311, 79 S.Ct. 329, 332, 3 L.Ed.2d 327, 331 (1959); see *State v. Nerney*, 110 R.I. 364, 292 A.2d 882 (1972). Just because those rules are relaxed, however, does not mean that inferences should be pyramided in order to find timely probable cause, particularly when the state has been unable to cite a single case wherein the time differential between the observations and the warrant has even approached 11 months.⁵

The state argues, however, that the apparent remoteness resulting from the 11-month-plus time interval has been overcome because the sergeant's affidavit is couched in the present tense and quotes the informant as saying that " * * * there is a precious metal scale located in the cellar portion of this house * * * there is also a large type service scale located in the back yard * * *," and "there is located in the cellar portion of [defendant's] residence an office in which the records of all transactions in stolen precious metals and contraband are kept." (emphasis added)

In support of this contention the state relies primarily on *Borras v. State*, 229 So.2d 244 (Fla.1969), appeal dismissed and cert. denied, 400 U.S. 808, 91 S.Ct. 70, 27 L.Ed.2d 37 (1970). There, the court held that an affidavit's failure to state when marijuana was sold to a confidential informant and was possessed by the defendant was not fatal to the validity of the search warrant. The court's only rationale was that the affidavit used the present tense in alleging a violation that continued right up to the time the warrant issued.

States, 115 U.S.App.D.C. 110, 317 F.2d 173, 177 (1963), where the court noted:

" * * * we cannot overlook the fact that the Government could cite, and we could find, no case which sustained a search warrant issued more than 30 days after finding of the evidence which constituted the basis for the search."

[7] But in our judgment the existence or nonexistence of timely probable cause should not turn on whether the affidavit's verbs end in "s" or "ed." Such an approach would be overly mechanical, contrary to the admonition against "an unduly technical and restrictive reading," *United States v. Ventresca*, *supra* at 111, 85 S.Ct. at 747, 13 L.Ed.2d at 691, and subject to the dangers referred to in *Rosencranz*, where the court said: *

"Officers with information of questionable recency could escape embarrassment by simply omitting averments as to time, so long as they reported that whatever information they received was stated to be current at that time. Magistrates would have less opportunity to perform their 'natural [sic] and detached' function. Indeed, if the affidavit in this case be adjudged valid, it is difficult to see how any function but that of a rubber stamp remains for them." 356 F.2d at 316-317.

While these pitfalls cannot be ignored, it must also be recognized that there will be cases where the use of the present tense, when viewed in the context of the surrounding circumstances, may inferentially demonstrate a continuum of probable cause from the time of the observations down to the time the warrant issues.

Thus, for example, in *United States v. Unger*, 469 F.2d 1283, 1287-1288 (7th Cir. 1972), cert. denied, 411 U.S. 920, 93 S.Ct. 1546, 36 L.Ed.2d 313 (1973), the facts were recited in the present tense, with rhetoric indicating that the undated events and observations had occurred recently. In addition, the citizen-informant's awareness of the potential for harm of the observed arsenal of dangerous weapons created a likelihood that he would "act upon his discovery with a degree of immediacy," and buttressed the timeliness of the complaint for the warrant. In *Coyne v. Watson*, 282 F. Supp. 235, 238 (S.D. Ohio 1967), the court

found that the affidavit's recital "that there is urgent necessity that said premises be searched in the night, to prevent said things from being concealed or removed so as not to be found" was language which "shows . . . its face that the information received by the officer was recently contemporaneous and was to the effect that the machine gun was 'now' in the possession of Coyne on the described premises."

But those cases are clearly distinguishable from this one. The underlying circumstances disclosed by the affidavit in this case do not reasonably yield an inference that the information received was "recently contemporaneous," or that the informant, notwithstanding his silence after four previous breaks, was suddenly compelled to tell all.

In sum, we find that there was nothing in the affidavit from which the District Court judge could have reasonably concluded that any of the described objects remained on the defendant's premises beyond the most remote date of the time span appearing therein, or even that they continued during the lapse of more than a month between the disclosures and the application for a warrant. The affidavit failed to disclose any basis for a finding that the described things were probably present in defendant's cellar or in the adjacent cinder-block structure when the warrant issued. Accordingly, we are compelled to conclude that the August 24th search warrant was invalid, that the search pursuant thereto was unlawful, and that the evidence seized in that search should have been suppressed. Because this conclusion is dispositive, there is no need to consider defendant's other arguments.

The defendant's appeal is sustained, the judgment appealed from is reversed, and the case is remitted to the Superior Court for further proceedings.

ROBERTS, C. J., did not participate.

FILED

JAN 14 11 01 AM '74

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

U.S. DISTRICT COURT
HARTFORD, CONN.

.....
UNITED STATES OF AMERICA .

VS. .

DAVID GUILLETTE, ET AL .
.....

NO. H-524 *smc*

MOTION TO SEVER

Now comes the Defendant, Nicholas D. Zinni, and moves this Honorable Court that his trial in connection with the above-captioned matter be severed from the trial of United States of America vs. William Marrapase on the grounds that a trial of both defendants at the same time would unduly prejudice the case of the defendant, Nicholas D. Zinni.

C. Thomas Zinni
C. THOMAS ZINNI, ESQUIRE
53 Mount Vernon Street
Boston, Massachusetts, 02108

CERTIFICATION

I hereby certify that on the Eleventh Day of January, 1974 I mailed a copy of the foregoing Motion To Sever to Paul Coffey, Federal District Attorney, U. S. Federal Building, 450 Main St. Hartford, Connecticut.

C. Thomas Zinni
C. Thomas Zinni

FILED

JAN 26 4 56 PM '74

U.S. DISTRICT COURT
HARTFORD, CONN.

Jan 28th 1974.

"Final action over (1) went, when Co-defendant Marrapase and Mr. Zinni shall appear with counsel; so ordered."

Ed. [Signature] 4/1/75

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA *
VS. *
DAVID GUILLETTE, ET AL *

NO. H-524

MOTION TO SEVER

Now comes the Defendant, Nicholas D. Zinni, and moves this Honorable Court that his trial in connection with the above-captioned matter be severed from the trial of United States of America vs. William Marrapese on the grounds that a trial of both Defendants at the same time would unduly prejudice the case of the Defendant, Nicholas D. Zinni.

C. Thomas Zinni, Esquire
53 Mount Vernon Street
Boston, Massachusetts 02108

CERTIFICATION

I hereby certify that on the Twenty-Ninth Day of April, 1974 I mailed a copy of the foregoing Motion To Sever to Paul Coffey, Federal District Attorney, U.S. Federal Building, 450 Main Street Hartford, Connecticut.

C. Thomas Zinni

the
"It is true that bill requires that the criminal conduct prescribed in section 245 (a) must, in order to be punishable as a federal crime, be committed "because of a victim's race, color, religion or national origin" and because the victim sought to engage in a protected activity."

Senator Hart - Jan. 18, 1968, pg. 319-320,
Congressional Record.

"It is true, of course, that there is much crime that is not racially motivated. But we have state and local agencies which are willing and, for the most part, able to deal with this parallel problem."

Senator Hart - Jan. 18, 1968, pg. 320,
Congressional Record.

"The separate issue to which the Judiciary Committee's bill directs its attention is the problem of inadequacy of local handling of racially motivated crime. H.R. 2516 is an attempt to assure the presence and deterrent effect of law enforcement in situations where too often, local law enforcement has been unwilling or unable to protect a portion of the population it is sworn to protect." (Emphasis added by Appellant)

Senator Hart - Jan. 18, 1968, pg. 320, Congressional
Record.

"Specifically H.R. 2516 would punish interference or attempts to interfere, by force or threat, with any person because of his race, color, religion or national origin and because such person had been seeking to engage in specifically enumerated activities." (Emphasis added by Appellant)

Senator Hart - Congressional Record, Jan. 18, 1968, pg. 317.

"Also punishable would be violence directed against persons not involved in civil rights activity, where such persons are selected as victims to intimidate others."

Senator Hart - Congressional Record, Jan. 18, 1968, pg. 318.

United States District Court
District of Connecticut
FILED AT HARTFORD

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
Deputy Clerk

FILED

AUG 6 10 52 AM '73

CLERK
DISTRICT COURT
HARTFORD, CONN.

UNITED STATES OF AMERICA

VS.

CRIMINAL NO. 524

DAVID GUILLETTE, ROBERT JOOST,
WILLIAM MARRAPESE, NICHOLAS ZINNI :

MOTION TO WAIVE JURY TRIAL

Now comes the defendant and alleges as follows:

That at the time of the arraignment, the prosecutor proffered to this Honorable Court, that the suggested bail on two (2) of the defendants, viz. Guillette and Joost, should be \$100,000.00 as to each and that the bail as to the defendants Marrapese and Zinni should be \$50,000.00.

Said above-mentioned suggested bail was made in that the prosecutor offered that the cases against Guillette and Joost were much stronger than that as against Marrapese and Zinni.

After being fully advised by my counsel, Andrew A. Bucci, as to my rights to a trial by jury, and after considering all the ramifications of a trial without a jury, and that the Honorable Court, sitting without a jury, would make all the findings of fact and law, I do hereby request that this Honorable Court allow a trial without a jury.

This request is made in view of the prosecutor's allegations as to the strength of the cases against his co-defendants, Guillette and Joost as opposed to the relative strength against him.

William Marrapese
WILLIAM MARRAPESE

Subscribed and sworn to before me at Providence this 2nd day of July, 1973.

Joseph P. Bonanno

July 21, 1973

"Court action held in city court, until just prior to trial, when the motion was made; as a result."

"Forceable interference with any of the activities set out in the bill would be prohibited whether committed by persons acting under color of law or by private individuals. Persons acting alone, as well as conspirators, would be reached by the bill's prohibitants." (Emphasis added by Appellant)

Senator Hart - Congressional Record, Jan. 18, 1968, pg. 318.

"H.R. 2516 is such a law. It does respond to the comment of Justice Brennan. Its clear language will avoid unnecessary litigation concerning coverage and will provide an unmistakable warning to lawless elements not to interfere with the activities protected by the bill." (Emphasis added by Appellant)

Senator Hart - Congressional Record, Jan. 18, 1968, pg. 319.

"This is a curious bill. It makes jurisdiction of the Federal courts in Federal cases depend on diversity of color."

Senator Ervin - Jan. 18, 1968, pg. 329, Congressional Record.

"I agree with my good friend, the floor manager of the bill, that it is wrong to deprive any man of the right to exercise his constitutional rights or rights under Federal law. However, why should the Federal courts have jurisdiction over a murder committed to deprive a man of his constitutional rights only in cases where the man who was murdered belonged to a different race than the accused."

Senator Ervin - Jan. 18, 1968, pg. 329, Congressional Record.

"The bill is not tailored for a particular region. It is restrained in its reach with respect to Federal Power because it is our belief that most violence directed against citizens finds adequate enforcement in State courts. However, we find

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further that there is a need now, based on the record, for legislation. We find in those cases where racial motivation is involved in the crime that Federal protection needs to be available."

Senator Hart - Jan. 19, 1968, pg. 398, Congressional Record.

"We do not propose that we shall make murder across the country a Federal crime. We do propose within the bill pending that when there is a deprivation of rights because of race, there shall be available Federal protection."

Senator Hart - Jan. 19, 1968, pg. 398, Congressional Record.

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25

[9] "It was the object of said conspiracy that
the above-named defendants, having obtained

[10] possession of thirty (30) stolen United States
Army M-16 A-1 machineguns, would transport said
firearms from Westerly, Rhode Island to Oneco,
Connecticut, where the weapons would be concealed
on or near the residence of Daniel LaPolla, of
Oneco, Connecticut until such a time as the
aforementioned defendants could ultimately
dispose of said firearms."

"OVERT ACTS: In furtherance of the
conspiracy and to accomplish the objects thereof,
the defendants performed the following overt acts:

1. On or about November 21, 1971 in the
District of Connecticut, defendants DAVID GUILLETTE,
ROBERT JOOST, WILLIAM MARRAPESE and NICHOLAS ZINNI
drove in two vehicles to Oneco, Connecticut.

2. On or about November 21, 1971 all of
the above named defendants deposited twenty-nine
(29) M-16 A-1 machineguns in the bedroom of
Daniel LaPolla, Spring Lake Road, Oneco,
Connecticut.

3. On or about November 23, 1971 defendants
Joost and Guillette, at Oneco, Connecticut
wrapped twenty-nine (29) M-16 A-1 machineguns in
a garbage disposal bag and dumped the weapons in
a quarry in Oneco, Connecticut."

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[570] Q What was the reason that you know for going to Oneco at that time?

A Mr. LaPolla had some jewelry or something, I think, if I remember right -- I'm not really sure. I'm pretty sure. -- that belonged to Mr. Marrapese.

* * *

[591] THE COURT: Did he say anything else?

THE WITNESS: He identified himself, I remember, because the man wanted identification and he showed him some identification, who he was.

BY MR. DANIELS:

Q Now, in showing the man identification, was this in the form of some kind of a card?

A Yes.

Q And did the card bear any name as to whose card it was?

A William Marrapese.

Q Now, on this card -- was this given to this individual in the gas station?

A No.

Q Was it shown to him by Mr. Marrapese?

A Yes.

Q And on the card it said William Marrapese?

A Yes.

Q All right.

THE COURT: What was it, like a calling

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card?

THE WITNESS: No. It's an identification card that he has from the service. I think it's from the service.

3

* * *

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5

[956] Q Did you receive instructions from Attorney Bucci when you were originally hired, what to do if you saw Mr. LaPolla?

6

A Yes, sir.

7

8

Q Did this include having Mr. LaPolla contact Mr. Bucci?

9

A Yes, sir.

* * *

25

Q What were you to do under those circumstances

1

[957] as instructed by Mr. Bucci?

2

3

A Identify myself and advise them of my exact purpose in the area.

* * *

1

[920] Q And was anyone with you?

2

A My mother and my sister.

3

Q And what is your mother's name?

4

A Mrs. Carmella Monticalvo.

5

Q And how old was she?

6

A She will be 81 September.

7

Q And you sister you say was also there?

8

A Yes.

9

Q- That would be William Marrapese's aunt?

10 A Yes.

11 Q And what was her name?

12 A Mrs. Mary D'Ambra, and she happens to be
13 Father LaPolla's mother's godchild. .

14 Q Could you explain that, please?

15 A Father LaPolla's mother is my sister Mary's
16 godmother.

17 Q I see. Is that something to do with a baptism?

18 A Yes. She baptized her.

19 Q Who baptized her?

20 A Father LaPolla's mother baptized my sister Mary,
21 Mrs. D'Ambra.

22 Q Is there some type of relationship between
23 the LaPollas, Monticalvos and Marrapeses dating back to
24 the grandparents?

25 A Not the Marrapeses. The Monticalvos. The

[921] Monticalvos way back, the grandmothers -- between the
2 grandmothers and the Petronellas which are the LaPolla
3 family.

4 Q Then there is a relationship between the
5 LaPollas and the Marrapeses dating back --

6 A Yes. Distantly.

* * *

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1 ||
2 [640] matter of fact, I have the book here. He signed the
3 Register and it was a Mr. O'Neill that signed it with
4 him.

5 Q May I have that Register, please?

6 A (Hands document) Somewhere in there the
7 names are there.

8 Q This Register which you handed to me, what
9 does that reflect?

10 A Well, it was placed at the back side of the
11 Church so that whoever came into Church would sign it
12 and then when everything was over, we would look through
13 the Register to see which friends had come in.

14 Q Was it the same Register that was kept the
15 previous day at the wake?

A Yes.

* * *

18 [975] Q Well, did Mr. O'Neill show any kind of a calling
19 card or a name card that you observed to Mr. and Mrs. Ezzel
20 at the gas station?

21 A Yes.

* * *

13 [983] Q Where did you go after that?

14 A After we had lunch, we went -- I believe it
15 was almost right across the street to a bicycle shop.

16 Q And was anything purchased?

17 A Yes. Mr. Marrapese purchased a bicycle.

18 Q A bicycle?

19 A Yes.
 20 Q For whom?
 21 A For his daughter.
 22 Q That is his daughter, Patricia?
 23 A Yes.
 24 Q Is she in the court room today?
 25 A Yes.

1
 2 [984] Q Is this the young lady (indicating)?
 3 A Yes.
 4 Q And what was the occasion for the purpose of
 5 the bicycle at that time?
 6 A It was for his daughter's birthday.
 7 Q This was September the 27th, 1972; is that
 8 correct?
 A Yes.

* * *

17 [1605] But when you go into the jury room, you collectively
 18 have to try and remember all the facts and the
 19 overwhelming consideration which you have before
 20 you in the jury room is, first of all, did a man
 21 die? Secondly, he died because he was a witness.
 22 And third, there were only four people in the
 23 world who had a motive to prevent him from testifyin.
 24 And when you consider that, you will reach the
 25 conclusion and be able to analyze all the other

1 [1606] little isolated instances which have been shown
2 to you, and you will be able to understand why
3 these particular incidents took place.

* * *

10 [1610] A big point is made on cross examination.
11 It was brought out that the defendants' finger-
12 prints are not on the particular bomb, but that
13 fingerprint man was presented by the Government
14 and the Government has never contended that the
15 fingerprints of William Marrapese and Nicholas
16 Zinni were on that bomb. It would be very, very
17 strange if they were.

18 You will recall in the gun conversation,
19 William Marrapese said "We'll get someone down
20 there." It's not Nicholas Zinni and William
21 Marrapese that had that expertise to produce that
22 bomb. In fact, when William Marrapese said "We've
23 got eight sticks." "We've got eight sticks.",
24 these are the managerial aspects of the conspiracy
25 particularly William Marrapese, the managerial

1 [1611] aspects. Not the blue collar worker, so to
2 speak, who actually goes out and makes up the
3 bomb.

* * *

17 [1265] Q All right. And what happened after you requested
18 permission to enter?

19 A He was not allowed at first, and there was some
20 discussion about my getting in. I can tell you what I said
21 to the Agents. I said to them that I wanted to be admitted, and
22 my sole purpose, my sole purpose was to find out if Daniel Lapolla
23 was attending that wake, he, the Reverend Lapolla having been
24 his brother, and I indicated to the officer, namely, Sal Petrella,
25 that I sought the admission to the parlor for the purpose of

[1266] interviewing Mr. Lapolla, if he would be interviewed, and he
2 could refuse me, and I told the officer if he would like to
3 come in with me or the Agent and be present when I interviewed
4 him or not be present, but that was my purpose. I was led into
5 the funeral parlor at that point.

6 Q And what did you do after you entered the funeral
7 parlor?

8 A I walked around the bier and I looked for the
9 stature and build and so forth of Mr. Lapolla that was given
10 to me by Mr. Marrapese, and without luck. The party that was
11 described to me that would be Dan Lapolla was not in my view.

* * *

12 [530] Q So is it fair to say that on your testimony
13 this morning that you arrived at -- you say at Carter's
14 Jewelry approximately twenty minutes of ten?

15 MR. COFFEY: That is not my mathematics,
16 Your Honor.

17 THE COURT: Do you agree with those
18 mathematics or not?

19 THE WITNESS: No, sir. I can't. I
20 can only give an approximation when I arrived
21 there.

22 BY MR. ZINNI:

23 Q I am asking you about twenty minutes of ten.

24 A I would say, roughly, about ten, thereabouts.

25 Q And did you testify before Mr. Justice Clarie

1 [531] and the jury that you would say that you eventually left
2 Mr. Guillette's -- page 92.

3 THE COURT: That is not the way to
4 do it, counsel. Were you asked this question
5 and did you give this answer on a certain date.

6 MR. ZINNI: Thank you.

7 BY MR. ZINNI:

8 Q Mr. Witness, did you give -- were you asked
9 this question: "At what time did you eventually leave
10 Mr. Guillette's residence?"

11 "A I would say somewhere around --

12 around ten o'clock."

13 "Q And where did you go?"

14 "A I went to Carter's Jewelry."

15 "Q Where is that located, sir? On
16 Reservoir Avenue in Cranston, Rhode Island?"

17 "A Correct."

18 Do you remember testifying to that?

19 A Yes, sir.

* * *

16 [413] Q Yes. That is what we are asking for.
17 Would it be, say, from ten to ten fifteen that you arrived
18 in that particular area?

19 A Around ten o'clock, thereabouts. I --

* * *

3 [338] Q Now, where did you go after getting into the
4 front portion, if anywhere, of Carter's Jewelry Store that
5 morning?

6 A Lou said "They're in the back."

7 MR. ZINNI: I pray that be stricken,
8 if Your Honor please.

9 THE COURT: Granted.

10 BY MR. COFFEY:

11 Q Where did you go?

12 A We traveled into the back portion of the building
13 where I had been there previously, as I previously
14 described.

15 Q And did you go into the back room?

16 A I did.

17 Q With whom were you with at that time as you
18 were going into the back room?

19 A Mr. Guillette.

20 Q When you got there, was anybody else already
21 in the room?

22 A Yes, sir.

23 Q Who?

24 A Mr. Marrapese, Mr. Zinni, Andrew Bucci,
25 Bobby Joost, Guillette and myself.

* * *

5 [345] Q Now, at this point, how long had this conver-
6 sation taken? How long had it taken place in terms of
7 minutes?

* * *

17 [414] Q And how long did that meeting take place?
18 How long did it take?

19 A Say roughly fifteen minutes, thereabouts.

20 Q Fifteen minutes. Could it be a half an hour?

21 A No. I don't think it was a half an hour.

22 Q Could it be twenty minutes?

23 A Fifteen minutes, thereabouts. It wasn't very
24 long.

* * *

3 [347] Q Where did you go in Woonsocket?

4 A To Eddie Sitko's residence.

5 Q Do you know where that is located?

6 A I believe it's on Maple Street -- I'm not
7 sure -- in Woonsocket.

8 Q Did you, in fact, meet with Mr. Sitko?

9 A We did.

10 Q Who was present?

11 A Mr. Guillette, myself, Mr. Sitko.

12 Q What transpired at that meeting?

13 A Mr. Sitko gave Mr. Guillette a gun and, in turn,
14 Mr. Guillette gave me the gun.

15 Q What was the gun for?

16 A To kill Daniel LaPolla.

17 Q What type of gun was it?

18 A It was a .32 Colt automatic.

19 Q Mr. Housand, did you kill Daniel LaPolla?

20 A No, sir.

21 Q On September 29, 1972, where were you?

22 A I was in the Wade County Jail, Raleigh,
23 North Carolina.

24 Q How long had you been incarcerated up to that
25 time, September 29th?

A Since July.

* * *

1 [365] examination also some of the crimes that you participated
2 in while you were in Rhode Island. You told us about this
3 fellow Daniels and Laneaux and yourself going out through
4 Rhode Island and Connecticut and passing these -- wasn't
5 it American Express Money Orders?

6 MR. COFFEY: Objection as to form,
7 Your Honor.

8 THE COURT: Yes. There were a number
9 of questions combined.

10 BY MR. DANIELS:

11 Q Did you testify to the passing of American
12 Express Money Orders?

13 A I testified to passing money orders, yes.

14 Q Were they American Express?

15 A If I recall, yes, they were.

16 Q Was it you, Daniels, Laneaux and Sitko?

17 A Yes.

* * *

5 [371] Q All right. My original question was: Now,
6 you are being told that you will not be prosecuted for
7 the check cashing scheme nor for the burglary in
8 Rhode Island, the possession of burglar tools?

9 A The possession of burglar tools was dismissed.

10 Q In any event, you were told you were not going
11 to be prosecuted for Rhode Island crimes?

12

A You're right.

13

Q Now, how about back on May the 10th, the 11th and the 12th, three days after this May 8th meeting, didn't the F.B.I. tell you that unless you gave them information concerning Joost and Guillette that you would be prosecuted for the check cashing scheme, to wit, the inter-state transportation of stolen American Express Money Orders as well as a conspiracy charge? Didn't they tell you that at that time, three days -- two, three and four days after the May 8th meeting?

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A Yes, sir. They told me this.

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Q I see. So, naturally, you told them about the activities of Joost and Guillette, criminal activities, did you not?

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[372] A I did. What I knew.

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Q What you knew. You told them about the check cashing; right?

4

A They knew about this.

5

Q You gave them information about it; right?

6

A I did.

7

Q You involved yourself in it; right?

8

A I did.

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Q You told them about this possession of burglar tools and you involved yourself in that as well as Joost and Guillette, did you not?

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A That was a matter of record.

Q Did you or did you not tell them certain information and involve yourself in that --

A Yes. I told them.

Q All right. So, naturally, at that time, telling them what you knew personally about these individuals two days after the May 8th meeting, you told them about the May 8th meeting, didn't you?

A I did not.

Q You did not. You didn't tell anyone on May the 10th even though you were threatened with prosecution for the inter-state transportation of stolen checks, for the possession of burglar tools, you didn't tell them on the 10th, the 11th or the 12th or at any time

1 [373] until eleven months later when you were in custody; isn't
2 that right, Mr. Housand?

3 MR. COFFEY: Objection, Your Honor,
4 as to form.

5 THE COURT: No. I think it's all
6 right if you understand it. Is that a fair
7 summary?

8 THE WITNESS: I talked with Federal
9 Agents concerning the LaPolla matter first in

4042

10 April of 1973.

11 BY MR. DANIELS:

12 Q All right. And the answer to my question is
13 "Yes", is that correct?

14 A Yes.

15 Q You are qualifying it with that last answer?

16 A That is true.

* * *

1 [445] A I blamed David Guillette for that?

2 Q Yes. You blamed David Guillette for the
3 beating that you received by Ricky Cochran, the husband
4 of Ida Cochran?

5 A David ordered a beating, yes.

6 Q You blamed him for that?

7 A Certainly.

8 Q And with this beating, this was a severe
9 beating, you received three broken ribs and a fractured
10 face and ended up in the hospital, didn't you?

11 A That is true.

12 Q And when you were in the hospital, this would
13 be, I believe, April the 24th, -- strike that. --
14 May 24, 1972?

15 A 23 I believe was the correct date.

16 Q 23. That is 15 days after this meeting you
17 say occurred on May 8th, 1972 at Carter's Jewelry?

18 A Yes, sir.

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Q And at that time you were angry, were you not,
at Mr. Guillette?

A Yes.

Q And you were visited by F.B.I. agents Davis
and Bubella?

A Bubella is the only one I recall.

Q F. B. I. Agent Bubella. You expressed your

[446] anger to Mr. Bubella, did you not?

A I did.

Q At that time you were being requested by them
to cooperate with them and to tell them anything you knew
about the activities of Guillette and Joost; isn't that
correct?

MR. COFFEY: Objection, Your Honor.

It's hearsay, what he was being requested by others.

THE COURT: No. I think it's quite
proper. Were you requested by them to cooperate
with regard to your dealings with Guillette and
Joost?

THE WITNESS: Yes, Your Honor.

BY MR. DANIELS:

Q As a matter of fact, they told you that if
you did not cooperate that they were going to prosecute
you on the federal charge of the inter-state transporta-
tion of stolen checks and that you were to be prosecuted

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19 for conspiracy and for the possession of burglar tools;
20 is that right?

21 A That is true.

22 Q Now, at that time, Mr. Houcand, fifteen days
23 after the May 8th meeting where you say Guillette and
24 Joost were present and where you were angry suffering a
25 severe beating, did you tell F.B.I. Agent Bubella about

1 [447] this May 8th, 1972 meeting at Carter's Jewelry?

2 A No, sir.

3 Q You didn't tell the Lincoln Police on
4 May 10th, 11th or 12th or the F.B.I. on May 11th?

5 THE COURT: I think you covered
6 that yesterday.

7 MR. DANIELS: All right.

8 Q The first time that you mentioned anything
9 about this meeting to Federal Agents was when the officers
10 Fowler and Watterson came to see you when you were incar-
11 cerated in North Carolina in 1973; isn't that right?

12 A That is correct.

13 Q And you gave them a statement at that time,
14 did you not, the April 18, 1973 statement?

15 A I did.

16 Q Now, I direct your attention to the last page
17 of the statement, last paragraph, that states:

18 "I have read the above statement

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consisting of 8 pages which I have signed. I
have had the opportunity to make changes, and I
swear the above statement is true and correct."
Signed "John A. Housand. Subscribed and sworn
to before me this 19th day of April, 1973."
Signed "Earl J. Fowler and James J. Watterson."

Is that what that states?

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[448] A Yes, sir.

Q Mr. Housand, will you show me anywhere in that
statement where you make any reference to any meeting at
Carter's Jewelry Store on May the 8th, 1972?

A No, sir.

Q There is nothing in that statement, is there?

A No, sir. There isn't.

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[359] Q Now, going back to the first time eleven months
after May 8th, this meeting you testified to, May 8th,
1972, eleven months later in April of 1973, you first told
the Federal Officers about that, you had already served
the better part of eight years in prison and you had just
been sentenced to six years on that present charge; isn't
that correct?

A That is true.

44 46

1 [360] Q So you wanted out of jail very badly at that
2 time, did you not?

3 A Everyone wants out of jail.

4 Q No. My question was, you.

5 A Certainly.

6 Q Everyone doesn't serve eight years, just
7 receiving six more. You wanted out of jail very badly,
8 did you not, Mr. Housand?

9 THE COURT: He just said "Yes".

10 THE WITNESS: I said "Yes."

* * *

5 [453] Q And in the engagement of this criminal activity,
6 you found it necessary to lie, didn't you?

7 A Yes, sir.

8 Q And in fact, I think you testified yesterday,
9 did you not, that you indulged in forgery?

10 A I did.

11 Q Larceny --

12 A Yes, sir.

13 Q -- burglary?

14 A Yes, sir.

15 Q And from 1965 on up to at least April 18th of
16 1973, you found it necessary to lie in indulging in your
17 criminal activities; isn't that correct?

18 A That is correct.

* * *

12 [550] Q Now, in response to some questions by, I
13 believe, Mr. Zinni, you indicated that there was a period
14 of time when lying was more or less a practice by you;
15 would that be correct?

16 A I beg your pardon?

17 Q Lying was a practice by you, something you
18 engaged in?

19 A Oh, yes, sir.

20 Q Were these related to the forgeries and
21 larcenies which you were associated in in the 1960's?

22 A Yes, sir.

* * *

3 [355] Q Forgery, that type of thing?

4 A Yes, sir.

5 Q Fraud, misrepresentation, that type of crime?

6 A That among other things, yes.

7 Q Yes. Now, from 1968, the three year conviction
8 for forgery and escape you served in the Nebraska
9 Correctional and Penal Complex, you were eventually
10 released and engaged in criminal activities, you were
11 again arrested and convicted in 1971; isn't that right?

12 A Yes. I believe it was 1971.

13 Q You were using the name at that time of
14 Stephen Longvall, were you not?

15 A Yes, sir.

16 Q So we have John Smith, Charles Kirby,

17 John Joseph Howard, Stephen Longvall and Marvin Dunkle;
18 is that it?

19 A Yes, sir.

* * *

17 [448] Q You do know Andrew Bucci?

18 A I do.

19 Q You do know him as an attorney licensed to
20 practice in the State of Rhode Island?

21 A Yes.

22 Q In fact, he was your attorney at one time?

23 A Yes, sir.

24 Q Now, you testified yesterday that this attorney
25 Andrew Bucci was actually present at the May 8th meeting,

1 [449] 1972 at Carter's Jewelry in Providence where you were
2 asked to kill LaPolla for \$5000; is that your testimony?

3 A That is correct.

4 Q Now, you testified in the Grand Jury on
5 May the 2nd, 1973 for 50 pages, did you not?

6 A I did.

7 Q And did you tell the Grand Jury and the
8 United States Attorney asking the questions -- did you
9 make any mention at all that Andrew Bucci was at that
10 meeting on May 8th, 1972 at Carter's Jewelry?

11 A I did not.

* * *

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1 [364] was told this.

2 Q When?

3 A Oh, sometime after I arrived in Connecticut.

4 Q Right. By Mr. Coffey --

5 A Yes, sir.

6 Q -- a representative of the United States
7 Attorney's Office; correct?

8 A He said that he would attempt to appear in my
9 behalf.

10 Q He also told you he did appear, didn't he?

11 A Subsequently he did.

12 Q And you are on parole; isn't that right?

13 A Yes, sir. I made parole.

14 Q Now, in addition to that, you were also promised
15 immunity for any participation which you say you had in
16 this LaPolla case; is that right?

17 A Yes, sir.

18 Q And you were also promised immunity for any
19 crimes that you may have committed while you were in the
20 State of Rhode Island, didn't you testify to a short time
21 ago on direct examination?

22 A Yes, sir.

23 Q Who promised you that?

24 A Mr. Coffey's office.

25 Q Mr. Coffey. Now, you testified on direct

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[374] Q Of course, you don't pay any rent and you don't pay for your food and you don't pay for your clothing?

A Oh, no.

Q So when you received this Thousand Dollars, this was above and beyond what was being furnished to you by the prison authorities; isn't that right?

A Yes.

Q They bought you cigarettes, they gave you money for shaving articles and all the toilet articles and anything else your heart desired up to \$85.00 a month above any subsistence of food and clothing and shelter; isn't that right?

A Yes. It was approximately that.

Q You had a running account at the commissary, did you not?

A Yes.

Q Agent Petrella gave you some of this money in cash, did he not?

A I believe some of it was in cash, yes.

* * *

[375] Q You were paroled in April of 1974. You testified you received an additional \$2160.00?

A Yes, sir.

Q All in all you have received in excess of \$3000.00; is that correct?

10 A Yes, sir.

11 Q The suit that you have on --

12 A Yes, sir.

13 Q -- the clothing, the shoes, the tie, the
14 shirt, the boots or whatever it is you are wearing; is
15 that right?

16 A Yes, sir.

* * *

2 [1031] THE COURT: My question was: Would
3 you, please, ask your witnesses to excuse themselves
4 or himself or herself?

5 MR. DANIELS: Mr. Longo, Judge McKiernan,
6 Mr. Rocheleau, Attorney Rao, would you all, please
7 step out?

8 (At this time the above named persons
9 left the court room.)

* * *

[1085] Q Is it Justice McKiernan?

20 A That is correct.

21 Q And what is your official professional capacity,
22 sir?

23 A I am a member of the Superior Court of the
24 State of Rhode Island, Court of General Jurisdiction.

25 Q As a Justice of the Superior Court --

1 [1086] A Associate Justice.

2 Q How long have you been an Associate Justice?

3 A Since 1956.

4 Q And prior to that time, sir, did you have --

5 A I was Lieutenant Governor for the State of
6 Rhode Island for a period of ten years.

7 Q Lieutenant Governor?

8 A Lieutenant Governor.

9 Q Now, do you recall the case of State versus
10 Robert Jorgi?

11 A Yes.

12 Q Do you recall any events concerning an in-chamber
13 conference?

14 A I remember it very well. On May 8th, 1972
15 several indictments were forwarded to me by the Judge who
16 handled the criminal calendar, Judge MacKenzie, and there
17 were five or six defendants named in the indictments, and
18 I had an in-chambers conference with the lawyers involved.
19 I believe those lawyers were Kelly, Sheehan, Bucci,
20 Rao, O'Neill, and I believe Mr. Mulligan of the Attorney
21 General's Department.

* * *

10 [1094] Q If Your Honor please, Mr. Justice, I think you
11 testified that you try to start all of your trials at
12 10:00 o'clock, your jury trials at 10:00 o'clock?

13 A The earliest we start a jury trial would be

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10:00 o'clock.

Q On that morning, did you follow that procedure?

A I doubt it because I believe that was the morning of a new jury panel, and when we have a new jury panel, they have to be qualified and before we can get a specific panel. We don't get a specific panel until 10:30 or quarter of 11:00.

Q Would it be fair to say that the conference that you held with all of these attorneys was between nine and ten in the morning?

A I would say not. I would say it would be around ten o'clock.

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[1095] Q Around ten o'clock?

A Yes.

THE COURT: You mean it started or ended?

THE WITNESS: Started.

BY MR. ZINNI:

Q And these attorneys all engaged in conference with you, did they?

A Yes, sir. Just a question of which case we were going to try. Five or six indictments involving the named defendants. They had been sent down to me. Five or six attorneys, and the question was which one we were going to try, and Mr. Mulligan was ready on all of them.

1 [1241] Q What time did you arrive at the Providence Superior
2 Courthouse on Monday, May the 8th, 1972?

3 A My best recollection, Mr. Daniels, is just prior
4 to 10:00.

5 Q And what did you do after you arrived?

6 A I went directly to the chambers of Mr. Justice
7 McKiernan.

8 Q And what occurred at that time, sir?

9 A At that time we were joined by another attorney,
10 John Kelly, and in turn, Mr. Rao.

11 Q That is Carmen Rao?

12 A Carmen Rao, and the prosecutor, Mr. Mulligan,
13 and the last of the people to arrive was John Sheehan, another
14 attorney. Prior, however, to Mr. Rao's arrival, we had walked
15 into the Judge's chambers.

* * *

5 [1242] Q When you arrived, did you go into the chambers?

6 A I did.

7 Q Who was there at the time?

8 A John O'Neill, myself, and I believe Kelly had
9 arrived, John Kelly.

10 Q And what occurred at that time and place?

11 A Walked into the chambers, however, the prosecutor
12 was not in the chambers and the Judge would not address us under
13 any circumstances until the prosecutor arrived.

14 Q So what happened then?

15 A Walked out of the chambers. That's when Mr. Rao
16 appeared and Ed Mulligan.

17 Q Mr. Mulligan is the prosecutor you people were
18 waiting for?

19 A That is correct.

20 Q What happened then?

21 A Walked back into the chamber. As I say, John
22 Sheehan had not yet arrived. He arrived later. And we sat
23 down in order to discuss the case.

24 Q At approximately what time did you enter the
25 Judge's chambers the first time?

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1 [1243] A Sometime shortly before 10:00.

2 Q And what time approximately did you enter the
3 Judge's chambers the second time with the prosecutor and the
4 other attorneys?

5 A My best approximation is about 10:15, Mr. Daniels.

6 Q What occurred after you entered the Judge's
7 chambers with the other attorneys?

8 A Well, we began discussing these several indictments
9 and the problem was that Mr. Mulligan had forgotten to take
10 his private files from the downstairs office of the Attorney
11 General which is on the fourth floor. Judge McKiernan's chamber
12 is on the fifth, and he went out temporarily to get his files

13 and he came back. Of course, there was no discussion of the
14 case until Mr. Mulligan returned, and I would say roughly he
15 was gone five or ten minutes. When he reappeared in chambers
16 with his files --

17 Q And what occurred after that, sir?

18 A Well, then a discussion ensued with regard to the
19 cases proceeding to trial.

20 Now, if Your Honor please, I am aware of hearsay. Do you
21 want me to --

22 Q No. Don't discuss any hearsay.

23 A All right. There was some discussion about what
24 cases will proceed to trial.

25 Q Was there any mention at that time about your

[1244] desire to make a motion before the Court?

2 A There was.

3 Q And what type of motion did you want to make at
4 that time?

5 A The motion was aimed at a continuance of the
6 cases in Providence on May 8th from its posture for trial to
7 picking another day certain for trial because of the attendant
8 publicity that the gun case got in Rhode Island just prior to
9 the time that that case would proceed, meaning that it had
10 such a saturation of advertisement in the paper that it would
11 be prejudicial to proceeding with the trial at that time with

12 those two defendants.

13 Q Which two defendants did this concern?

14 A Marrapese and Zinni in that case.

* * *

19 [1103] Q What time did you get to court that morning
20 in Superior Court?

21 A Around ten o'clock, sir. Ten, ten fifteen.

22 Q And when you arrived there, did you see the
23 defendant, Zinni, in the corridor?

24 A I think I did. I'm not absolutely sure, but
25 I believe I did.

1 [1104] Q And did you have any conversation with
2 Mr. Zinni?

3 A I may have, sir, but I couldn't say specifically.

4 Q And do you know the time that the conference
5 started in the Judge's chambers?

6 A I would say around 10:15. Between 10:15 and
7 10, 10:30, approximately.

8 MR. ZINNI: Thank you. I have no
9 further questions.

10 THE COURT: Cross?

11 CROSS EXAMINATION

12 BY MR. COFFEY:

13 Q Mr. Kelly, what time was it that you arrived
14 at the Superior Court on May 8th?

15 A Around ten o'clock, I would say, sir.

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[1105] Q Was Mr. Bucci already there when you arrived?

A Yes. I think he was.

Q Was Mr. O'Neill?

A Yes.

* * *

[1125] Q What time did you arrive at Justice McKiernan's court room that morning?

A To the best of my recollection, it was sometime between 10:10 and 10:15. Around that general area. I know I had been in another court room previously.

Q What court room had you been in previously?

A To the best of my knowledge, Justice McKenzie, who called the criminal calendar.

Q And after you arrived in the court room of Justice McKiernan ---

THE COURT: In the chambers, I think he said.

THE WITNESS: Yes, Your Honor.

BY MR. DANIELS:

Q Did you go through the court before you went to the chambers?

A Pardon?

Q Did you go into the court room before you entered the chambers?

1 [1126] A No. I went through his ante-chamber so-called
2 or waiting room. I don't think I physically went in his
3 court room. I am not sure.

4 Q You went directly into the chambers?

5 A Yes. I did.

6 Q Was anyone present at the time you arrived?

7 A Well, there were a group of attorneys there.
8 There was Edward Mulligan, Special Assistant Attorney
9 General, there was Andrew Bucci, Carmen Rao, I believe
10 there was Mr. Zinni from Boston, Thomas Zinni, there was
11 Attorney Jack Kelly, John Kelly and myself.

* * *

9 [1024] Q What time did you arrive in Judge McKiernan's
10 court room?

11 A I think it was around ten minutes or so after
12 10:00 A.M.

* * *

4 [1048] Q During the period 10:10 to approximately
5 11:30 on the morning of May 8th, did you see Andrew Bucci
6 at any time?

7 A Just when I did see him which would have
8 been when he came out of Judge McKiernan's chambers which
9 would have been -- just a guess, probably ten to
10 fifteen minutes before this 11:35 A.M. when we started.

* * *

6 [1025] Q At sometime during that morning, did someone
7 exit from the Judge's chambers?

8 A Yes.

9 Q Who exited from the Judge's chambers?

10 A I saw Carmen Rao.

11 Q That is the attorney?

12 A An attorney. Edward Mulligan, attorney, and
13 Andrew Bucci.

14 Q Did Mr. Mulligan have any function concerning
15 this particular trial?

16 A He was the Prosecutor.

17 Q And you mentioned Andrew Bucci.

18 A Yes. I'm pretty sure I saw Andrew Bucci.

19 Q Now, did you observe these people exit from
20 the Judge's chambers?

21 THE COURT: He just said he saw three
22 people, Rao, Mulligan and Bucci come out of the
23 Judge's chambers.

24 BY MR. DANIELS:

25 Q Approximately, how long was this after you
first arrived in Judge McKiernan's court room at ten

[1026] minutes past ten?

2 A It was quite some time afterwards.

3 THE COURT: Can you approximate the time
4 afterwards?

5 THE WITNESS: It could have been

6 45 minutes to an hour, possibly. Exactly I
7 don't recall.

8 THE COURT: Thank you.

9 BY MR. DANIELS:

10 Q What is your best estimate?

11 THE COURT: He just said between 45 minutes
12 and an hour.

* * *

10 [1127] Q How long did the conference last?

11 A To the best of my recollection, we left there
12 between 11:15 and 11:30 because the reason I say this
13 --

14 MR. COFFEY: Objection.

15 THE COURT: No. They didn't ask you
16 that.

17 THE WITNESS: Excuse me, Your Honor.

18 THE COURT: 11:15 to 11:30?

THE WITNESS: Yes, Your Honor.

* * *

5 [1105] Q I see. When the conference broke up, you
6 don't know what the specific time was, do you?
7

8 A Not the specific minute. I think it was
around after 11:00 o'clock. Around that time.

* * *

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15 [1254] Q Did you see William Marrapese at the Courthouse
16 on May the 8th, 1972?

17 A Yes. I did.

18 Q And at what location?

19 A In the Court chamber -- open Court.

20 Q In open Court. And can you tell us when during
21 the Court proceedings you observed him there?

22 A It was after we had left the chamber of Judge
23 McKiernan, the inner chamber, where we had been from 10:15 to
24 quarter of eleven, 11:00, so it must have been around quarter
25 to eleven, 11:00.

1 [1255] Q And did you see Nicholas Zinni at the Court that
2 day?

3 A Yes. I did.

4 Q Where did you observe him?

5 A At the same location.

6 Q And approximately what time?

7 A Approximately the same time. At the same time.

8 Not approximately.

* * *

3 [1068] Q Now, I would direct your attention to the
4 morning of May the 8th, 1972. Did you go with any
5 particular court room that morning?

6 A Yes. I did.

7 Q And prior to going to the court room, where
were you?

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A I was in my office which is on the fourth floor.

Q Which court room did you go to?

A I don't know the number. I think it's court room number 10 that I was summoned up there by the Judge by telephone.

Q By which Judge?

A Judge McKiernan.

Q And after arriving in court, did you take down any statements by any persons within the court?

A Yes, sir. I did.

Q And did you make notes, stenographic notes, as you were taking down the statements or the testimony?

A Yes, sir. I did.

Q Have you had occasion to prepare a transcript of the proceedings which took place that morning from your notes?

A Yes, sir. I have.

* * *

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[1249] Q Have you refreshed your recollection as to the persons who spoke as contained within the document?

A May I look at it once more, please?

Q (Hands document)

A Yes. It has refreshed my recollection.

Q How many persons were speaking?

A Mr. O'Neill, Mr. Mulligan, Mr. Rao, the Court

62 64
14 and myself.

15 Q That would be Judge McKiernan?

16 A It says "The Court" here, but that was Judge
17 McKiernan.

18 Q How long was it between the time that you first
19 exited from the Judge's chambers after the conference until
20 you began to speak on this motion made by the prosecutor, Mr.
21 Mulligan?

22 A It was few minutes, Mr. Daniels. I don't know
23 exactly what the Judge may have been doing in his chambers,
24 but it was a few minutes interval from the time we left the
25 inner chambers to Open Court, whatever that time is, Mr. Daniels.

([1250] I couldn't help you.

2 Q How long did the motion take?

3 A Minutes. Five. Not lengthy.

4 Q And after the motion, what occurred?

5 A Then the case that was selected for trial was
6 called, and it happens that it was the trial of one, Robert
7 Jorgi, and the attorney on that particular case was Carmen Rao.

* * *

5 [1248] THE WITNESS: Yes. I'm sorry. The document,
6 Defendants' R refreshes my recollection.

7 THE COURT: Now, having it refreshed, what
8 is your recollection?
9

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THE WITNESS: I recollect now is that Mr. Mulligan, the prosecutor, himself made the motion with regard to postponing a portion of the defendants' trials to May 22nd.

BY MR. DANIELS:

Q And which defendants were concerned with that motion?

A Marsiglio, Zinni, Page, Marrapese.

Q And does there appear some statements by you contained within Defendants' R?

A There are.

Q And who else is talking at the time of the motion?

A Mr. O'Neill.

* * *

25 [1073] Q All right. How long did this motion to continue

1 [1074] take from the time the first words were spoken until the
2 Court ruled?

3 A I would estimate ten minutes.

* * *

7 [1084] Q Without telling us what he said, did you hear
8 Mr. Bucci speak on the motion?

9 A Yes, sir. I did.

* * *

24 Q The words that you heard Mr. Bucci speak while
25 the motion for continuance was being made, are they

of 66

[1085] 1 || contained in Defendants' Exhibits R and S?

2 || A. Yes, sir. They are.

* * *

3 [1071] Q Immediately following the making of this
4 motion for a continuance, did something occur?

5 A May I refresh my recollection, please?
6 Immediately after the motion was made and granted, the
7 Judge took a short recess so that we could get a jury
8 panel empaneled on the case that we were about to start.

9 Q Was that State versus Robert Jorgi?

10 A Yes. It is.

11 Q And did you take down the testimony during
12 the Jorgi trial?

13 A Yes. I did.

14 Q Were you present when they began to select a
15 jury?

16 A Yes. I was.

17 Q Did you take this down in your notes also?

18 A Yes, sir. I did.

19 Q All right. Now, how long before the jury
20 selection process began was the recess taken?

A I would say five minutes.

* * *

8 [1250] Q Between the completion of the motion and the
9 Judge's ruling and the beginning of the trial, the selection
10 of the jury, was there any time lapse?

11 A There was a recess, Mr. Daniels.

12 Q How long was the recess?

13 A Again, I am not sure. It might have been minutes
14 because I left that chamber -- I'm sorry. Minutes.

15 Q What did you do during that recess?

16 A I left that chamber to attend to another matter
17 before another Judge on the same floor of the same Courthouse,
18 and that particular thing that I had to do took minutes.

19 Q What did you do?

20 A I withdrew an appearance on behalf of a particular
21 person.

22 Q Who was that person?

23 A James Harris.

24 Q Now, in order to do that, to withdraw your
25 appearance for James Harris, did that require the approval of

[1251] some Judge?

2 A Yes.

3 Q Which Judge?

4 A It was Judge McKenzie at that time. It was Judge
5 McKenzie.

6 Q Was he in a different Courtroom than Judge
7 McKiernan?

8 A Yes. Geographically, maybe one hundred fifty
9 feet down one corridor and one hundred fifty feet down the
10 other. About 300 feet away, walking.

11 Q Did this require his personal approval?

12 A Yes.

13 Q Did you speak with him directly?

14 A Yes.

15 Q And he gave his approval for the withdrawal?

16 A Yes.

17 MR. COFFEY: Objection. That is hearsay.

18 THE WITNESS: Well, I'm -- yes.

19 BY MR. DANIELS:

20 Q What occurred next, sir?

21 A I walked back to the Courtroom where the Jorgi
22 matter was about to start.

23 Q What were the first proceedings for the State
24 versus Jorgi trial?

25 A Well, the case had to be called. Is that what

[1252] you mean?

2 Q Yes.

3 A The case was called, and there was a jury selection
4 process, and in that particular case, the process took a very
5 short period of time. Do you want me to continue or --

6 Q Where were you when the jury selection process
7 began?

8 A In that Courtroom.

9 Q And any particular location?

10 A Yes.

11 MR. COFFEY: Any other answer would be
12 unresponsive.

13 BY MR. DANIELS:

14 Q At what location?

15 A Well, taking this Courtroom as an example, when
16 the jury panel entered, took the seats in the rear of the
17 Courtroom, they occupied the whole area. Judge McKiernan's
18 chamber is small.

19 Q Chamber or Courtroom?

20 A Courtroom. It's a small Courtroom and the jury
21 would sit on one side such as this, but there is also another
22 jury panel arrangement on the other side, and I took a seat
23 on the opposite side where the jury would commence being selected
24 and that would be next to defense counsel table.

* * *

25 || [1112] Q Did you see Mr. Bucci on the morning of

1 ||
2 [1113] May 8th at any other time other than within the in-chamber
3 conference?

4 A Yes, sir.

5 Q When did you see him?

6 THE COURT: He just said he saw him
7 in court. Did you not just say that a little
8 while ago?

9 THE WITNESS: Yes, Your Honor.

10 BY MR. DANIELS:

Q That was during the motion to pass?

11 A Yes, sir.
 12 Q Any other time?
 13 A Yes, sir.
 14 Q Would you tell us when?
 15 A Just before I began to either empanel the jury
 16 or just before Judge McKiernan called for a jury
 17 Mr. Bucci was still in the court room, and this would
 18 have been following the motion that we just referred to.
 19 Q Where was he located --
 20 A My recollection -- excuse me.
 21 Q Where was he located within the court room
 22 at this time?
 23 A To my left, as I recall, in a jury box chair
 24 to the left of counsel table, sometimes used for a jury
 25 box. It was not used for the jury box in this particular

(1114) / || trial.

* * *
 11 Q Mr. Fuina, how long have you been a member of
 12 the Providence Police Department?
 13

A My twentieth year.

* * *
 5 [1040] Q And incidentally, were you named Policeman
 6 Of The Year last year?

MR. COFFEY: Objection, Your Honor.

THE COURT: Named by whom?

MR. ZINNI: Providence Police.

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THE WITNESS: The year before last.

BY MR. ZINNI:

Q 1972?

A Yes, sir.

Q And what was that award, please?

A Policeman Of The Year.

* * *

[1035] Q Where were you seated during this period of time, sir?

A Next to Edward Mulligan, the Prosecutor.. To his left facing the Judge.

Q You would be seated as Officer Petrella is seated next to Mr. Coffey, the Prosecutor?

A Yes.

Q This was your case then; is that correct?

A Yes.

Q During the -- strike that.

Did you record on Defendants' Exhibit Q the time when the jury selection process began?

THE COURT: He said he recorded two times, one when they began and two when they ended, did you not?

THE WITNESS: Yes, sir.

BY MR. DANIELS:

Q What time did you record that the jury selection

19 process began?

20 A 11:35 A.M.

21 Q What time did you record that the jury selection
22 process ended?

23 A 11:52 A.M.

24 Q At either of these two times, did you observe
25 the attorney, Andrew Bucci?

1 [1036] A Yes.

2 Q When?

3 A When we started.

4 Q And the time would be 11:35?

5 A Yes, sir.

6 Q Where was Mr. Bucci at that time?

7 A Sitting at counsel for the defense's table.

8 Q Now, Mr. Jorgi, the defendant, was he
9 represented by an attorney at that time?

10 A Yes, sir. He was.

11 Q By whom?

12 A Carmen Rao.

13 Q Where was Mr. Bucci seated in relation to the
14 attorney, Carmen Rao?

15 A As I recall it, in the approximate position
16 where Mr. Zinni is sitting now.

17 Q Thomas Zinni?

18 A No. Nicholas Zinni.

1
2 [1045] A Well, when the request was made, I couldn't
3 remember dates or times and when I pulled the case out
4 for that date, I saw this in with the case which I
5 wouldn't -- and so I brought them with me.

6 MR. COFFEY: I see. I have no
7 objection, Your Honor.

8 THE COURT: Q received.

9 (Three pages-notes-jury list received
and marked Defendants' Exhibit Q.)

* * *

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2 [1049] Q Now, is it your testimony that after the
3 jury was picked on May 8th you did not see Andrew Bucci
4 again?

5 A I don't recall seeing him. I was engrossed in
6 the beginning of the trial and the parts to be played
7 thereafter.

8 Q Do you recall seeing him -- do you have any
9 specific recollection on seeing him leave the court room?

10 A I remember him leaving because I remember
11 someone came in to the court room and said -- I don't
12 remember who it was because I saw it out of the corner
13 of my eye, and then I turned and saw Mr. Bucci stand up
14 and he excused himself, and I don't remember whether it
15 was to Mr. Rao or to whom, or the Judge, but I remember
16 him leaving, and then I became engrossed in what I was
doing, but I remember him leaving.

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Q Yes. And did you see Andrew Bucci back in the court room after he departed?

A No. Never again for the rest of the day.

Q Can you recall today who that individual was who came in and whispered to Mr. Bucci?

A No. I cannot.

MR. COFFEY: Thank you.

THE COURT: Any other questions?

* * *

[1050] Q At what point did this individual come in and whisper to Mr. Bucci?

A I don't remember. I remember it was during -- it could have been when the witness was on the stand.

THE COURT: The question is: What is your best recollection when it was?

THE WITNESS: Exactly, I cannot recall.

BY MR. DANIELS:

Q In relation to the court proceedings, was it before the jury selections started or afterwards?

A I think it was after jury selection.

Q Was completed or started?

A Was completed, I think, I can't be sure. It's been some time.

Q The jury selection was completed, you said,

11:52?

A 11:52 A.M.

* * *

1 [1254] Q What was your purpose in remaining there until the
2 noon recess?

3 A Well, it was two fold, Mr. Daniels. I had cleared
4 my trials for that day assuming to go to trial on the case that
5 I was there for, and I had cleared my other Court calendar for
6 that day. And secondly, it was close to lunch when that process
7 began, and I waited for Mr. Rao to have lunch with him. I can
8 tell you why, but it wouldn't be responsive.

* * *

21 [1102] Q Now, at any time on that morning, did you
22 observe the defendant, William Marrapese?

23 A I recall that he was in the corridor, and
24 that's all I recall, that he was in the corridor.

25 Q Do you recall whether this was before you went

1 [1103] into chambers for the conference or afterwards?

2 A After.

3 Q Do you recall how long it was after you left
4 the conference?

5 A I believe immediately coming out of the
6 conference, he was outside in the corridor, and I sat
7 down with Mr. Marsiglio and he was there at that time,
8 as best I recall.

9 Q Do you recall anyone else associated with the
10 case in the corridor at that time and place?

11 A Mr. Rao, Mr. Eucci and Mr. O'Neill.

12 Q Any defendants other than Marrapese and
13 Marsiglio, is it?

14 A Marsiglio and, I believe, Mr. Zinni was there.
* * *

18 [1143] Q Did you see William Marrapese at any time
19 that morning?

20 A I believe I did. I am not positively sure,
21 but I believe I did.

22 Q Do you recall where he was?

23 A I believe he was in the --

24 MR. COFFEY: Your Honor, I am going
25 to object if he is not sure he did. He is

1 [1144] speculating where he was.
2

3 THE COURT: Well, your best
4 recollection is yes or no?

5 THE WITNESS: My best recollection
6 is yes because of the fact that I --

7 THE COURT: No, not because.

8 THE WITNESS: Yes, Your Honor.

9 THE COURT: You did see him. The
10 next question is where?

11 BY MR. DANIELS:

12 Q Where?

13 A He would be in the outside of the court room.

14 THE COURT: Would be or was?

THE WITNESS: Was.

* * *

14 [1026] Q During this 45 minutes to an hour, did you do
15 anything?

16 A Yes.

17 Q What did you do?

18 A I was out in the corridor conferring with the
19 various attorneys attempting to learn what was going to
20 transpire from the attorneys. Also, the defendants who
21 were there.

22 Q All right. And can you tell us who the
23 individuals were by name that you saw out in the corridor
24 during this 45 minute period starting at ten minutes past
25 ten, 45 minutes to an hour?

1 [1027] A As I recall it, I talked to Nicholas Zinni,
2 Mario Marsiglio, William Marrapese, John Sheehan, attorney.
3 It was a long time. I think I remember John O'Neill,
4 attorney.

5 THE COURT: Do you remember him or do
6 you remember talking to him?

7 THE WITNESS: I think I remember
8 John Sheehan. I think I seen not John O'Neill,
9 but John -- I talked to John Sheehan.

* * *

3 [1057] Q Is it your testimony then that William Marrapese
4 and Mr. Zinni could have been in the hallway right up
5 to the time of the jury selection process began at
6 11:25?

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MR. COFFEY: Objection, Your Honor.

8 I think the same objection was raised to a question
9 I asked relating to Mr. Bucci, to what he could have
10 been --

11 THE COURT: The question is bad as to
12 form.

13 BY MR. DANIELS:

14 Q Is it your testimony, sir, that when you
15 last saw Nicholas Zinni was at some time between 10:10
16 and the time when the jury selection process began?

17 A It would have been probably ten to fifteen
18 minutes even before that because as soon as I learned we
19 were going to begin, I left that floor.

20 Q Before what, sir?

21 A Before we began the trial.

22 Q All right. Before you began the jury selection?

23 A Yes.

24 Q So it would be ten or fifteen minutes before

25 11:35?

1 [1058] A Yes. Probably ten or fifteen minutes.

2 Q All right. And when did you see William Marrapese
3 for the last time that morning?

4 A The last time would have been out in that
5 corridor.

6 Q In this same conversation?

7 A Well, not the same conversation, but in the
8 same area-way and the same time span.

* * *

22 [1127] Q Did you observe Mr. Marrapese at any time
23 that morning?

24 A I believe I did, but I am not positive.

* * *

23 [1244] Q All right. But was Nicholas Zinni there?

24 A Nick Zinni was.

25 Q Was Bill Marrapese there?

./ [1245] A. Yes. He was.

* * *

4 [1001] Q Do you recall what day of the week December 18,
5 1973 was?

6 A I believe it was a Tuesday, sir.

7 Q Was there any particular reason why you began
8 the first run at 10:35 and why you began the second run
9 at 11:00 o'clock?

10 A I had received a request earlier from
11 Special Agent James Watterson of the New Haven Office to
12 conduct such a trip, and he said he would like the trip
13 to be performed between 10 and 11 A.M.

14 MR. DANIELS: Thank you very much.
15 Nothing further.

16 THE COURT: You didn't tell us the
17 time of your second trial run.

18 THE WITNESS: I initiated the second
19 trial run, Your Honor, at 11 A.M. --

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THE COURT: The time consumed.

THE WITNESS: Oh, the time consumed was
14 minutes and 30 seconds.

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[994] Q. And how much time did this take?

A. This trip took me 14 minutes and 17 seconds.

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[997] Q Now, in making the trip from the Courthouse
to Reservoir Avenue, William Marrapese's business, are
there any traffic signals?

16

A Yes, sir.

17

Q Do you have any idea how many?

18

A There are two pedestrian stop signs and there
are seven traffic lights.

19

Q And did you have a red light at any one or
more of these traffic lights?

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22

A I did not have to stop at either of the
pedestrian stop signs as there were no pedestrians coming,
and I hit every green light down to 986 Reservoir Avenue.

23

* * *

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[999] Q Did you lose any time at any red lights, any
of these seven traffic signals on this second trip?

14

A Again, I was fortunate or unfortunate. I
did not meet any red lights, any resistance at any red
lights. They were all, again, green as I made this trip.

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Q And again, were there any pedestrians in the
pedestrian cross walks that you had to possibly stop for?

19

A No, sir.

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Q So the seven traffic signals and the pedestrian stop signs did not impede your motion or increase the time; is that correct?

A Yes. sir.

* * *

[177] MR. DANIELS: We will object --

MR. ZINNI: Objection, Your Honor.

MR. DANIELS: -- based on the grounds previously stated in the brief.

MR. ZINNI: The defendant, Zinni, joins in the objection.

THE COURT: You say this is as far as you are able to go today?

MR. COFFEY: I have finished with his testimony except for the playing of the tape recorder, yes.

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[84] MR. COFFEY: Ladies and gentlemen, before the next witness, the parties have entered into a very short stipulation. It is hereby agreed and stipulated between the parties that Daniel LaPolla, the victim of the dynamite bomb on September 29, 1970, did not commit suicide, did not die of accident and did not place the explosive device which killed him.

* * *

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[1255] Q What did you do after the completion of the Court that morning?

THE COURT: He said he had lunch with a lawyer named Rao. Did you not?

THE WITNESS: I did, Your Honor. Yes.

* * *

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[1478] The second thing that strikes anyone reading this indictment and certainly you have to consider the indictment is that dynamite was used and who had possession of dynamite? Without which this

1 [1479] device here obviously could not have functioned.

2 Two people. One, David Guillette, when he and
3 John Housand burglarized Mike Lanoux's trailer
4 in Manville, Rhode Island and took dynamite sticks
5 and blasting caps which were then possessed by
6 David Guillette to a place unknown. Who else?
7 William Marrapese whose own voice you will hear
8 in a few minutes state that he had possession of
9 dynamite, and he is going to use it to take some-
10 one off, to kill. Who? A witness, a witness in
11 the Brooklyn Jail. Made to whom? This is one
12 of the ironies in life that if you saw it in a
13 movie, you would discount it as being a movie.
14 He made it to the person, Daniel Lapolla, who
15 later turned out to be a person who was killed
16 by dynamite and who was a witness. Unknown,
17 completely unknown to William Marrapese and
18 Nicholas Zinni at the time that the very person
19 they were making those remarks to was going to
20 be a witness against them.

* * *

8 [1480] Now, you see in front of you earphones, and
9 I will ask you at this time to take those ear-
10 phones together with the transcripts. Can I ask
11 you to take them for a minute, please? When you
12 listen to this tape recording, listen very

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13 closely because you are going to hear the voices
14 of Daniel Lapolla, William Marrapese and Nicholas
15 Zinni. You are not going to hear them discuss
16 what the Yankees did that day. You are not going
17 to hear them discuss what new cars were bought.
18 You are going to hear them discuss stolen M-16's
19 and dynamiting the Brooklyn Jail.

20 (At this time the Court, Jury Members and Counsel listened
21 to the tape from 11:06 A.M. to 11:15 A.M.)

22 MR. COFFEY: Twice during that conversation
23 Daniel Lapolla refers to William Marrapese by
24 name. "Billy. Hey, Billy, you trying to get
25 rid of the rat population up there?" "Yeah."

1 [1481] "Whose up there? Whose up there?" "Oh, they got
2 all kinds of witnesses up there." "We figure
3 if the whole joint goes, we're guaranteed to get
4 him." "We got eight sticks."

5 You may hear argued that Nicholas Zinni only
6 said six words in the first part of the conversation,
7 "He wants to buy the rifles?", and on the last
8 part of the conversation he only says he wants
9 coffee. But Nicholas Zinni was there during those
10 remarks and Nicholas Zinni understood as William
11 Marrapese said "We got eight sticks."

* * *

11 [1620] Now, there are many items raised by both
12 the Government and the defense, some of which
13 are in conflict. Perhaps the most significant
14 one, perhaps the one with which you can weigh, if
15 it can be said this way, the credibility of the
16 defense argument is to recall the statement by
17 Mr. Daniels that William Marrapese's threat to
18 blow up the Brooklyn Jail with witnesses inside
19 of it was an idle boast. Is that an idle boast?
20 Was it said with the same type of idle boast
21 that he had just got through saying that he was
22 setting \$100.00 apiece for the M-16's? Was that
23 an idle boast that related to the offense under
24 which he was ultimately indicted? It wasn't an
25 idle boast. William Marrapese himself, out of

1 [1621] his own mouth, without knowing that he was being
2 recorded, without having any idea that his state-
3 ments would be challenged, which removes any
4 motivation to lie, which is important. It was
5 said in the relative security of knowing he was
6 saying it to whom he believed to be a friend.
7 He admitted culpability as to Nicholas Zinni in
8 the gun case. He stated that they had enough
9 dynamite, "We have enough dynamite to blow up
10 the Brooklyn Jail." It's important because it

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places in his possession an environment where
there is no reason to lie. Possession of dynamite.

* * *

[189] MR. ZINNI: If Your Honor, please, may
I respectfully request that the Court instruct the
jury for the limited purpose, as I understand it,
for which this testimony is offered.

THE COURT: I don't recall any limited
purpose, counsel.

MR. ZINNI: Well, I thought that it would
be otherwise inadmissible. I thought it was
intended by the Government to show motive or state
of mind of something of that affect.

THE COURT: Well, I will tell the jury
later on when I charge the jury, but I don't tell
them why I admit things in evidence now. It is
admitted and that is the state of the evidence.

MR. ZINNI: Thank you, Your Honor.

THE COURT: Now, shall we all put the
earphones on? Everybody appears ready.

* * *

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[190] (At this time the tape recording
(Government Exhibit 34) was played.)

* * *

1 MR. ZINNI: It can wait, Your Honor.

2 THE COURT: It doesn't make any
3 difference.

4 MR. ZINNI: Your Honor, I would like
5 to renew my motion to sever inasmuch as the
6 evidence that is being compiled and, of course,
7 the defense -- co-defense counsel has a right
8 to proceed on any theory he thinks is beneficial
9 to his client. I would like to suggest to the
10 Court that the evidence being introduced has --
11 it's like a two edged sword. It could very well
12 be very beneficial to Mr. Marrapese, explaining
13 the reasons for his investigation, then they may
14 also be construed as being against Marrapese, and
15 for this evidence to spill over again to Mr. Zinni
16 seems to be highly inflammatory, and if the Court
17 is compelled to instruct the jury at some point in
18 its instructions that any act of one of the co-
19 conspirators is attributable to the other
20 conspirators, then we may possibly be in deep
21 trouble.

22 Further, it would appear to me that
23 Mr. Marrapese's testimony again, and I will be
24 brief here, is going to be helpful, very helpful
25 to us, and we can show that if Mr. Marrapese

1 were to take the stand that the testimony that
2 would be adduced would be -- would have an
3 exculpatory affect and that Mr. Marrapese, if
4 the trial at some point ends, of course, would
5 be in a position to testify, there would be a
6 likelihood that he would testify, and if, in fact,
7 we may be deprived of that defense, it would seem
8 to me that we are in a very desperate position
9 when we could have adduced evidence that would
10 have been very helpful and probably favorable to
11 the defendant.

12 I want to cite -- I know it's a
13 Fifth Circuit, and I appreciate the respect we
14 have for the Second Circuit, but I do have a
15 case, United States versus Martinez which I think
16 is squarely in point, 486 F.2d 15.

17 Thank you very much, Your Honor.

18 THE COURT: I will wait until I read
19 it. 486 F.2d 16?

20 MR. ZINNI: 15, Your Honor.

21 THE COURT: 15. Thank you.

22 (Whereupon, the court recessed at
23 12 noon and reconvened at 1:05 P.M.)

24 THE COURT: Mr. Zinni, I read the
25 Martinez case, and I think your motion doesn't

1
2 encompass what that case holds. But in any
3 event, your motion is noted and denied. You
4 have an exception.

5 MR. ZINNI: Thank you, Your Honor.

6 THE COURT: And that Officer I asked
7 to stay, I don't really need him.

8 MR. COFFEY: All right, Your Honor.

9 THE COURT: I'm sorry. Unless
10 somebody else wants you. You can stay if you
11 wish.

12 (At this time the jury members entered
13 the court room.)

14 THE COURT: Your next witness, please.

15 MR. DANIELS: Mr. Luongo.
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1 considered as against the defendant, Zinni, and unless it
2 can be shown that there was, in fact, a May 8th meeting and
3 that that conspiracy continued, then the defendant, Zinni, is
4 no part of it, and I would strongly suggest and urge upon the
5 Court that even at this late stage that the defendant, Zinni,
6 be severed from the trial.

7 THE COURT: Well, I will deny the motion and
8 just make the observation that I spent a great many years
9 guessing as to what jury notes mean, and I haven't yet
10 decided what they mean at all. It might very well be in the
11 nature of things that one juror wants to know something for
12 his own personal reasons, period. But anyway, you made the
13 motion.

14 MR. ZINNI: Would you note my exception,
15 please?

16 THE COURT: You made the motion. It is denied
17 and your exception is noted. But I do have a note from the
18 jury. "Please re-read that portion of your charge where you
19 give the legal definition of "conspiracy". And then beneath
20 that paragraph, "Question. Is it possible under that
21 definition of conspiracy for one conspirator once a conspiracy
22 has been formed to cease to be a member of that conspiracy
23 without a new conspiracy being formed?"

24 And now I will entertain discussions on that.
25 Are you familiar with the law of withdrawal from conspiracy?

1 THE COURT: I was told that you had a motion,
2 Mr. Zinni.

3 MR. ZINNI: Your Honor, yes, please. For the
4 Court's consideration, I would like to move again that the
5 defendant, Zinni, be severed from the trial inasmuch as the
6 question that was propounded yesterday seems to pre-suppose
7 or assume on the part of the jury that there is more than one
8 conspiracy involved here. It appears if, in fact, the question
9 is directed to Mr. Zinni, the more favorable aspect of it,
10 then it appears that there are several conspiracies and we
11 are, apparently, no part of it.

12 THE COURT: Well --

13 MR. ZINNI. I would suggest, Your Honor, please,
14 that it appears that the jury is considering possibly and
15 most probably that the May 8th meeting, if it did exist,
16 terminated with Mr. Housand's departure, that any acts there-
17 after, prior similar acts, probably would not -- or the
18 acts thereafter the May 8th meeting would not apply certainly
19 to Mr. Zinni. If that is the case, certainly, on that basis
20 alone we would be entitled to a severance.

21 And I would further suggest, Your Honor, please,
22 that taking the evidence as it now appears in retrospect that
23 prejudice is rampant throughout the trial because it appears
24 that about eighty percent, ninety percent of the evidence was
25 against another defendant and very possibly this is being

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concerning another subject matter --

THE COURT: Well, we are dealing with a lot of different things now. We are talking now about the affect on the jury of them not hearing the tapes, but we and the press hearing them, and then they getting it second hand. That's a problem far removed from the first two problems; namely, (1) are the tapes admissible, and (2) are the transcripts admissible?

MR. DANIELS: Yes, Your Honor. I would respectfully suggest that Your Honor read the transcription of the tape, the alleged transcription.

THE COURT: The whole tape or just what he is going to use?

MR. DANIELS: Just what he is going to use.

THE COURT: That's part of the brief he gave me, I think.

MR. DANIELS: Together with the briefs. We are offering the defendant's brief to be filed at this time.

MR. ZINNI: If Your Honor please, if I may be heard for a moment.

THE COURT: Yes.

MR. ZINNI: I would respectfully request that the material, the contents thereof is highly, of course, prejudicial against the defendant, Zinni, and it is to me

bears no relevance to the charges here at hand, and the contents of what was spoken by Mr. Marrapese, apparently, is highly inflammatory and Mr. Zinni in no way, in no way indulges in the conversation concerning this matter. It seems to me to admit it -- even if the Court were to rule that it would be admissible -- against Mr. Marrapese, we find ourselves in a very difficult position because although the transcript will show that Mr. Zinni said absolutely nothing about any --

THE COURT: Well, he did say something right away I see on page two.

MR. ZINNI: Nothing about the subject matter.

THE COURT: "He wants to buy the rifles." The questions, Mr. Zinni.

MR. DANIELS: Your Honor, I am wondering at this point if I could move -- my motion at this time would be that Your Honor consider this material out of the presence of the press or to exclude all persons from the court room. If this is to be argued freely by the attorneys, I would direct the Court's attention to the Waterbury Republican for this morning, May the 29th. The very things that Your Honor requested that the press not print, to wit, that I had previously represented Raymond Patriarcha, reputed New England Mafia Kingpin,

MR. DANIELS: If that could be done.

THE COURT: We can't do it until the jury is here.

MR. DANIELS: I am asking if it can be done without the jury.

THE COURT: I thought I made myself perfectly clear. Perhaps I don't do it too well. As of now, you cannot do what you propose to do because it is during the Voir Dire. You may do it when the jury is back and you can examine him to your heart's content anyway you wish.

MR. DANIELS: All right. Thank you.

MR. ZINNI: If Your Honor please, may I now be heard?

THE COURT: Yes.

MR. ZINNI: I would like to at this time, Your Honor, if the Court is considering -- is about to admit the transcript into evidence, the tape into evidence and the transcript --

THE COURT: No. I haven't passed on the transcript yet at all.

MR. ZINNI: The tape as well, Your Honor. I would move that it be excluded as to the defendant, Zinni, and if such is not the case, I would renew my motion, if the Court please, to sever.

THE COURT: Tell me why you suggest that?

MR. ZINNI: Yes, Your Honor. First of all, the tape that is referred to is totally irrelevant to this charge. The references made are to another charge.

THE COURT: I don't know whether it's irrelevant to this charge. Wouldn't it show the motive for doing what the Government says they did?

MR. ZINNI: Well, it might for one person, but it might not for another, and if that is the case, wouldn't it be highly unfair to permit the Government to introduce it as against one defendant and let the affects --

THE COURT: The Government is right here. Are you offering it against both defendants?

MR. COFFEY: I certainly am, Your Honor.

MR. ZINNI: On that basis, Your Honor, I would move to sever because I believe the contents clearly establish that the defendant, Zinni, may not even have been present and did not --

THE COURT: No. You don't mean that, do you?

MR. ZINNI: Some of it, yes, Your Honor.

THE COURT: Really?

MR. ZINNI: Some of it I do.

THE COURT: How will I gather that inference?

MR. ZINNI: You will gather that in the appropriate time when the defendant or somebody else takes the stand to say he wasn't.

THE COURT: Oh, God. Yes. That creates a question of fact, but as of now, this witness has testified that he heard his voice on two occasions, maybe three. I forget. Page 2 is once.

MR. ZINNI: Only twice, if I recall correctly.

THE COURT: Twice.

MR. ZINNI: Yes, Your Honor. And it's so highly prejudicial against the defendant, Zinni, as to -- to me, what would constitute, and I trust I could impress the Court with it, just a highly unfair and inflammatory situation so that the defendant, Zinni, is just brought in with the flock.

THE COURT: That is what happens when people conspire to break the laws, if that is what they were doing.

MR. ZINNI: Of course, this was on March 31, 1972 before any allegation of any conspiracy.

THE COURT: Yes. But it tends to show, I take it the Government is going to argue, why they did what the Government claims they did.

MR. ZINNI: If Your Honor, please, it

would almost seem --

THE COURT: All right, counsel. You make your motion and I will rule on it. What is your motion?

MR. ZINNI: My motion is the defendant, Zinni, at this time be severed from the trial of the United States against William Marrapese.

THE COURT: Denied. Exception noted.

MR. ZINNI: Thank you, Your Honor.

THE COURT: All right. Is there anything else now?

MR. COFFEY: Yes, Your Honor. I move, of course, for the admission of the transcript as well.

THE COURT: Now, that requires a little bit different treatment. In most of the cases that I have read, according to your brief, there was an agreement that there was no objection with regard to the transcript. In one case, there was some changes made and both sides suggested what the correct transcript was.

MR. COFFEY: But in the original gun trial, Your Honor, not only was there no agreement as to the transcript, but defendant, Zinni, claimed he wasn't even on the tape. Judge Clarie allowed the transcript into evidence as well as the tape, and as you know, the Second Circuit is affirming that conviction --

THE COURT: Yes. But they said there was no objection.

MR. COFFEY: Oh, no. Not on the original gun trial, Your Honor.

THE COURT: Can we have a short recess and I will get it.

(A short recess was taken.)

THE COURT: Well, I did check the Marrapese case and you are quite right. The Court of Appeals did hold that both the transcript and the tape were admissible. I was confused with the Bryant case which said that there was no objection during the trial. So I will receive both the transcript and the tape.

MR. ZINNI: Your Honor will note an objection, please?

THE COURT: Yes. When I rule contrary to your position, you get an exception for both sides.

MR. ZINNI: Thank you.

THE COURT: One lawyer at a time.

Mr. O'Neill.

MR. O'NEILL: All right. Then go ahead.

MR. DANIELS: Your Honor, I know Your Honor has ruled that the tape recording is admissible. The only difficulty is that I don't believe we have proffered any argument other than the inadmissibility of the

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF CONNECTICUT

3 * * * * *

4 UNITED STATES OF AMERICA * CRIMINAL ACTION

5 vs. * NO. H-524

6 NICHOLAS ZINNI * MAY 6th, 1974

7 * * * * *

8 Before: HON. T. EMMET CLARIE, U.S.D.J.

9
10 A p p e a r a n c e s:

11
12 For the United States of America:

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16 For the Defendant:

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20
21
22
23 ELLIOTT SPERBER
24 Official Court Reporter
25 United States District Court

1 MR. COFFEY: Good afternoon, your Honor. I
2 don't know what the Court's calendar is, but I
3 know that there is one matter before the Court,
4 it is a motion by Nicholas Zinni for a severance
5 from William Marrapese in Criminal Number H-524.

6 Mr. Zinni's attorney, Thomas Zinni, is in
7 court at this time.

8 MR. ZINNI: Thank you, your Honor. First of
9 all, if it please the Court, I wish to thank the
10 Court for its indulgence, and the U. S. Attorney,
11 in permitting this matter to be continued to this
12 afternoon.

13 I'm aware that the Court had previously con-
14 sidered this motion. I, however, felt that it was
15 incumbent upon me at every stage of the proceeding
16 to protect the Defendant's rights.

17 And in this matter, the motion for severance
18 seems to be of extreme importance to us. And I
19 would beg the Court's indulgence in hearing this
20 out.

21 First of all, we would, of course, reaffirm
22 the arguments we gave previously. But, it seems
23 that since the motion was argued before your Honor
24 several weeks ago that several other things have
25 come to light. And probably the most important of

1 which is the matter of the inconsistent defenses
2 that this Defendant, Zinni, is faced with, with
3 respect to this trial.

4 It seems that the Government may -- perhaps
5 will -- use the statements of Mr. Marrapese, which
6 he has made. And if it does, we are then faced
7 with the matter of being bound by his defense.

8 And this necessarily puts us in a position
9 where we are hamstrung, so to speak, in not being
10 able to produce our own defense, whatever that
11 might be.

12 THE COURT: Doesn't his statement, if it is
13 used -- and that hasn't been determined, according
14 to the prosecutor -- doesn't that exculpate your
15 client?

16 MR. ZINNI: Not the matter of who did the
17 killing. As I recall correctly, Mr. Coffey has
18 in his possession statements that Mr. Marrapese
19 has in fact blamed the previous Defendants,
20 Defendant Joost and Defendant Guillette in this
21 matter, if I recall correctly.

22 That being the case, it seems to me as though
23 we are bound, or to some extent at least, certainly
24 to have this matter heard within the hearing of
25 the jury, which puts us in a position where we are

1 fighting with ourselves.

2 Maybe this is ideal for the Prosecutor, but
3 it doesn't give the Defendant a fair trial. We
4 are faced with a possible inconsistent defense.
5 And we feel that we are entitled to a severance.

6 The matter, of course, under the Bruton case
7 also, it seems to me, that any of the statements
8 made by a co-defendant should not be construed as
9 against the other Defendant -- that seems to me to
10 be of paramount importance. And I fail to see how
11 any instructions to a jury, bearing in mind that
12 they aren't lawyers, how in an instruction to the
13 jury it could possibly cut away the damage and the
14 inflammatory residual effect that this may cause.

15 THE COURT: What inculpatory statement has
16 been made that would involve your client?

17 MR. ZINNI: Well, if I may, not only the
18 statements of Mr. Marrapese, but also I understand
19 that the United States Attorney -- I think Mr.
20 Coffey did in fact make this representation to the
21 Court: That there is a wiretap, there are wiretap
22 statements given or made at the time that Mr.
23 LaPolla was present in American Gold Buyers --

24 THE COURT: That wasn't a wiretap, Counselor,
25 that was a tape.

1 MR. ZINNI: That was a tape, I'm sorry. It
2 was a tape.

3 And as I understand, those statements made by
4 Mr. Marrapese will be introduced into evidence.
5 And if I recall correctly -- in fact, I'm sure --

6 THE COURT: There were two of them. The part
7 you are concerned about is the conversation about
8 blowing up the jail?

9 MR. ZINNI: That's correct.

10 THE COURT: Where the Government witness was
11 located?

12 MR. ZINNI: That's correct. And my brother
13 had no part in that conversation. At one point,
14 I think he was asked what kind of coffee he wanted,
15 and that was it. And I think there was another
16 statement about "How are you today?" And that was
17 the entire, as I recall it -- well, anyway, I
18 think that is what the United States Attorney has
19 supplied me with. That was the entire conversation
20 as far as the Defendant Zinni was concerned.

21 Now, all of the conversations with respect to
22 the blowing up of the jail --

23 THE COURT: I might mention at this point,
24 I notice that there is one newspaper man usually
25 sitting over here. I trust that won't be incor-

1 porated in his article, because it could be
2 prejudicial to the trial of the case.

3 Proceed.

4 MR. ZINNI: Thank you, your Honor. If in
5 fact this tape evidence is introduced, I assume
6 that the United States Attorney will contend that
7 there is a pattern of conduct here, and that is to
8 show the behavioral conduct of Mr. Marrapese as
9 being inclined to do this sort of thing. Certainly
10 where the Defendant Zinni had no part of that
11 conversation, and I might remind the Court that
12 the evidence, I think, did show, if it didn't
13 it certainly will in the case that will come to
14 trial, that the Defendant Zinni was an employee
15 of American Gold Buyers at the time.

16 And to permit that statement, I beg the Court
17 to recognize the tremendous spill over and the
18 residual effect it would have, it would have such
19 an adverse consequence to the Defendant Zinni that
20 it almost seems if in fact Mr. Marrapese were
21 found guilty that the Defendant Zinni would be
22 found guilty, just by the mere fact that he was
23 present.

24 Sometimes all of the instructions of a Judge,
25 with all due respect to the Court, seem to have no

1 effect upon the jury, if in fact there is a
2 thought that this young man or that young man was
3 involved in this matter, and therefore, he should
4 be considered all part of the same kettle of fish.

5 I also mention this, and I think it bears
6 repeating, the last time we were here, the United
7 States Attorney indicated that he would seek to
8 put in evidence with respect to the threats made
9 by Mr. Marrapese. The threats were of a very
10 serious nature. And here again, no part of the
11 Defendant Zinni anywhere present, if I recall
12 correctly, even where the statements were made.
13 And certainly, no statements -- and I think the
14 United States Attorney will agree with me -- no
15 statements were made by the Defendant Zinni.

16 Then, if I may, if your Honor please, without
17 plagiarizing, I think Brother Santos submitted to
18 this Court a memorandum in support of various
19 motions. And I thought that Mr. Santos did a very
20 objective job in presenting the evidence in the
21 light most favorable to the Government, in
22 recapitulating the evidence for the Government,
23 or in support of his motions.

24 And as I looked at the evidence, I was simply
25 amazed, if I recall correctly, that the Defendant

1 Zinni's name never appears once. I could be
2 wrong, but that is my memory of having read this
3 document.

4 There is reference made to plane flights,
5 hotel meetings, telephone calls, and a funeral --
6 if I recall correctly there was not one single
7 bit of evidence -- and it looks to me like it was
8 presented in the light most favorable to the
9 Government in this written document -- it seems to
10 me in the light of fairness and justice, and I
11 beg this Court, that all of this material that
12 would get in apparently by the United States Govern-
13 ment as against Mr. Marrapese would be most
14 devastating to the Defendant Zinni.

15 And if there was a time that I think justice
16 called for a severance, it seems to me it is in
17 this case.

18 And I think the United States Attorney would
19 admit this afternoon that the evidence that they
20 have compiled against two of the Defendants already
21 tried, and once against Mr. Marrapese, whether it
22 is of probative value, or is of any value, or
23 whether or not it is believable, the evidence that
24 they have compiled against the other three is
25 overwhelming as opposed to the Defendant Zinni.

1 There is hardly a thing here -- and it seems
2 to me that the very simple, basic elements of
3 justice and fairness and equity require that this
4 Defendant be severed in this case.

5 I suppose that I should say something as to
6 the argument that the United States Attorney would
7 offer. And I suppose that it would be mostly
8 because of expense. I submit to this Court that
9 the expense involved in the case, as against the
10 Defendant Zinni, would be a whole lot less, be-
11 cause I can represent to this Court fairly and
12 honestly that first of all there will be hardly
13 much of a defense to present, and secondly, it
14 seems with Mr. Zinni's case severed, that the
15 trial would probably last one week, as opposed to
16 perhaps five, six or seven weeks -- however long
17 the previous trial or this other one may last.

18 Then I think that, lastly, no matter how
19 exculpatory the statements made by Mr. Marrapese
20 may be, the fact of the matter is that if in fact
21 the jury believes what the Government has, it
22 puts the Defendant Zinni in such a position that
23 he cannot help but be tainted by the evidence.

24 And the mere fact that he is tainted by the
25 evidence, it seems to me ought to be persuasive

1 enough to this Court to permit a severance.

2 And it is somewhat difficult for me, because
3 of the relationship -- my brother has asked me
4 to represent him -- the cost involved in something
5 like this is stupendous -- I am not only willing,
6 but I want to empathize just as much as I can in
7 any case that I have, but I am trying in the most
8 proper and difficult way that I can to assure
9 objectivity.

10 I really have never had a case in my eighteen
11 and a half years of law practice in which I can
12 honestly say that this would seem to be the most
13 ideal situation for a severance.

14 And I think the evidence -- and the Government
15 will show, and they have had plenty of surveillance,
16 had plenty of opportunity -- the evidence would
17 have shown, after certain events took place in
18 respect to this gun charge, that it was very
19 definitely a breaking away by the Defendant Zinni
20 from any part or any participation in any of the
21 activities of the other three that have been in-
22 volved in this action.

23 Lastly, I suppose I ought to say that I have
24 great respect for this Court. I think I have
25 watched the Court on a couple of occasions, and I

1 think that this Court has tried to be very fair.

2 And it seems to me that this Court is in a
3 better position to determine whether or not a
4 severance is just than any other Court that could
5 possibly hear this case.

6 And while it surprises me that the motion
7 came before your Honor, I am glad that it did.
8 I am just hoping and praying and begging your
9 Honor to consider the elements that I have produced
10 here today, or enunciated today, and hope that
11 the Court can see that fairness and justice can
12 only be served by a severance in this case.

13 I see no other way in which another Judge
14 can, at the outset of a trial -- I can come before
15 a Judge and say "Judge, certain things have taken
16 place, and these are the things that we think
17 ought to be considered in a severance."

18 This Court has heard voir dire; it's heard
19 motions; it's heard a full trial. It seems to me
20 as though this Court is in the best position
21 possible to make the decision.

22 I beg this Court to make a decision, and I
23 beg it to make it favorable to the Defendant Zinni.

24 I am willing and quick to say to you today,
25 your Honor, that I would want to see justice done,

1 too. And I think that if in fact my brother were
2 to go to trial in a severed position, and there
3 was a guilty finding, then I would say, so be it.

4 But, I'm convinced today that if my brother --
5 and I think the United States Attorney, too, is
6 convinced -- were to get a severance in this case,
7 that he would come forth with a not guilty.

8 And I am confident here today, as I stand
9 before the Court, and I pray your Honor's judgment
10 in our behalf.

11 Thank you.

12 MR. COFFEY: Your Honor, as the Court knows,
13 last week we had an opportunity to argue with Mr.
14 Daniels the theory that the Defendant is entitled
15 to a severance, because of inconsistent defenses.

16 The Court knows the Government's position,
17 one of which is that it is not a ground for a
18 severance.

19 And, in any event, they are not in a posture
20 in this particular case where you have inconsistent
21 defenses. I can think of particular cases in-
22 volving receiving stolen goods, whereas there
23 are multi-defendants, and you got the driver saying
24 "I didn't know they were stolen, and I don't know
25 anything about it", and the kingpin saying "I don't

1 even know these fellows." And the argument would
2 be that those are inconsistent. But the key is
3 that there is one Defendant fingering the other
4 Defendant, and is that going to be the Government's
5 case? In which case that would be a Bruton
6 situation.

7 The Court is familiar with the evidence that
8 the Government offered in the previous trial. And
9 I think the Government has given to the Court in
10 camera sufficient indication of what the remaining
11 posture of the case is, with respect to statements
12 by either one or both of the Defendants, to
13 appreciate the fact that neither one of these two
14 Defendants is going to, so far as the Government
15 knows, to claim that the other Defendant -- that
16 is, Marrapese claiming Zinni had something to do
17 with the death of Daniel LaPolla, or Mr. Zinni
18 claiming that Mr. Marrapese had something to do
19 with the death of Mr. LaPolla.

20 If one Defendant were to claim that the death
21 of LaPolla was an accident, and the other Defendant
22 were to claim someone else is responsible, maybe
23 someone who had something to harbor against Mr.
24 LaPolla, or what have you -- that is not incon-
25 sistent defense. And I still feel that it is

1 probably a very cogent defense in this case,
2 because they have an opportunity by going their
3 separate paths, while both maintaining not only
4 his innocence, but the other's innocence, to get
5 before the jury a reasonable doubt on two
6 different claims: One of accident and one of
7 culpable act by a third party, not before the
8 jury at this time.

9 I don't have any statement by either Defendant
10 that it is claiming that the other Defendant
11 killed Daniel LaPolla. And I think under Bruton
12 that is the only situation where they'd be
13 entitled to a severance.

14 And if the Government has such a statement,
15 they still would not be entitled to a severance
16 unless and until the Government were to use that
17 statement at trial, in its entirety.

18 So, at this point, I think Judge Murphy can
19 only be the Judge who is in the best possible
20 position to rule upon that particular issue.

21 On another point, I don't think it even
22 merits serious discussion at this point, to go
23 into the merits of the Government's case, except
24 to say that for some weeks in the prior trial, we
25 heard nothing but claims by defense counsel that

1 the Government's evidence is insufficient, and
2 the jury came back with a verdict of guilty.

3 In any event, the Court will remember quite
4 specifically that Mr. Housand testified that at
5 the meeting on May 8th, 1972, Nicholas Zinni, as
6 well as the other three Defendants and another
7 individual, agreed to kill Daniel LaPolla.

8 And Nicholas' remark was "Yes, let's go
9 ahead and do it."

10 Now, his brother's claim that the Government's
11 evidence is weak, or insufficient, is much less
12 than against the other Defendants, under the
13 applicable laws of conspiracy. And under this
14 case, it does not hold water, because Nicholas
15 Zinni, by specifically agreeing to the death of
16 Daniel LaPolla, made himself liable for the acts
17 of other individuals in the conspiracy, who were
18 better able than he to carry it out.

19 I have no evidence whatsoever that Mr. Zinni
20 has broken away, incidentally, from Mr. Marrapese,
21 after the gun case. I don't know where that
22 particular statement comes from. But, even if it
23 is true, it is not grounds for a severance.

24 I will reiterate that the only person I think
25 who can best judge on whether a severance should be

1 granted is the trial judge who is hearing the
2 evidence as it comes in against the Defendants.
3 And the evidence against Marrapese and Zinni is
4 not going to be completely the evidence against
5 the other two Defendants. We anticipate that there
6 will be more evidence, as well. How can this
7 Court, without knowing what that evidence is,
8 rule upon a severance at this time.

9 I think the Court's position so far that
10 Judge Murphy is the only one who can rule on that
11 motion is the one best taken.

12 Thank you, your Honor.

13 THE COURT: Counselor?

14 MR. ZINNI: Your Honor, may I just say one
15 thing further? The United States Attorney has
16 seen fit to say that neither Defendant has fingered
17 the other in connection with this matter. I'm
18 not sure that he nor anybody else has prophetic
19 abilities.

20 We don't know. There may be something along
21 that line. Who does know?

22 With respect to the only statement that the
23 Government seems to make, and says, that the
24 United States Attorney says, that Nicholas Zinni
25 has said, was a meeting called on May 8th, 1972.

1 I thought that was very well handled as a matter
2 of defense. Of course, no one knows what a jury
3 will believe. It is always an interesting matter.
4 But, it seems to me that there were considerable
5 other things that were introduced into evidence
6 that certainly, I don't believe, would be
7 applicable to the Defendant Zinni.

8 And for that reason, I again strongly urge
9 that the Court consider the severance.

10 THE COURT: Thank you, gentlemen.

11 MR. ZINNI: Thank you very much.

12 MR. COFFEY: Your Honor, while we have Mr.
13 Zinni here, may I point out that the Government
14 has agreed to certain items for discovery and
15 inspection? I want to state for the record, while
16 Mr. Zinni is here, that most of the physical
17 evidence which the Government has is in the Clerk's
18 office, and is available for inspection by the
19 Defendant or his counsel.

20 And in addition to that, the original trans-
21 script and recordings of conversations of which Mr.
22 Zinni was a participant are also available for
23 the Defendant's inspection, if it makes proper
24 arrangement with the Government, as soon as we are
25 through with these motions.

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THE COURT: Probably a conference with you would expedite that?

MR. COFFEY: Yes. I want to put it on the record, so that we are not delayed on the 21st.

THE COURT: I assume Attorney Zinni is familiar with the motions that were heard last Friday by Mr. Raymond Daniels, who is new counsel appearing for Mr. Marrapese?

MR. ZINNI: I am familiar with three motions I believe that were filed. I do not know what the decisions were, unless the Court has not already handed down the decisions.

THE COURT: Well, the Court has just written them today. The motion to disqualify the prosecutor has been denied.

In the case of Marrapese, he argued the question of severance, and it was denied without prejudice, subject to being renewed before the trial judge.

A motion for discovery and inspection was granted, as to Paragraphs 1, 2, 3, 4, 5, 10, 11, 13, 16 and 17, and denied as to Paragraphs 6, 7, 8, 9, 12, 14 and 15.

There was a motion by Government counsel under Rule 16(c) for discovery and inspection. The

1 motion was consented to by counsel for William
2 Marrapese. Compliance by May 10th.

3 That was a motion by Government counsel
4 that the Court grant relief to the Defendant with
5 respect to the requested item, that requested the
6 Court to condition such disclosure by requiring
7 the Defendant to permit the Government to copy
8 its stenographic reports, and papers which the
9 Defendant intends to introduce at trial, and has
10 in its possession. That was consented to by Mr.
11 Daniels.

12 I think that comprises the action on the
13 motions.

14 MR. ZINNI: Thank you very much.

15 MR. COFFEY: There is one other small point.
16 I have been notified by the Court Reporter that
17 most of the testimony which was recorded at the
18 original trial is now available to the parties.
19 And I would think that if Mr. Zinni wants to get
20 that particular testimony, I should let him know
21 it is available, through the Court Reporter.

22 THE COURT: Thank you.

23 MR. ZINNI: Thank you very much, your Honor.
24 (Whereupon the hearing was concluded.)
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United States District Court
FOR THE
DISTRICT OF CONNECTICUT

MICROFILM

United States District Court
District of Connecticut
FILED AT WATERBURY

JUN 28 1974
NEW HAVEN
v.
NICHOLAS ZINNI

1974
Sylvester A. Marzocchi, Clerk
Deputy Clerk
No. H-524 Criminal

On this 26th day of June, 1974, came the attorney for the government and the defendant appeared in person and by counsel

It Is ADJUDGED that the defendant upon his plea of not guilty and a verdict of guilty has been convicted of the offense of violation of Title 18, United States Code, Section 241 in Count 1 (conspire to injure, oppress, threaten and intimidate a citizen of the United States of America in the free exercise and enjoyment of a right and privilege secured to him by the Constitution and laws of the United States); violation of Title 18, United States Code, Section 1503 in Count 2 (endeavored, by force and violence, to influence, intimidate and impede a witness in the Court of the United States) and Title 18, United States Code, Section 844(h)(1) in Count 3 (use an explosive to commit a felony prosecutable in a Court of the United States)

as charged^a in three (3) counts, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is ADJUDGED that the defendant is guilty as charged and convicted.

It Is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of the remainder of his life on Count 1; five (5) years on Count 2; and ten (10) years on Count 3. The sentences of imprisonment imposed in Counts 1, 2, and 3 are to run concurrently with each other.

It Is ADJUDGED that^b

It Is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

The Court recommends commitment to: "

John F. Murphy
United States District Judge

Clerk.

^a Insert "by [name of counsel], counsel" or "without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." ^b Insert (1) "guilty" and the defendant thereupon there is a factual basis for the conviction.

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FILED

JUL 5 3 20 PM '74

CLERK
U.S. DISTRICT COURT
HARTFORD, CONN.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA *
VS. *
NICHOLAS D. ZINNI *

NO. H-524 *520*

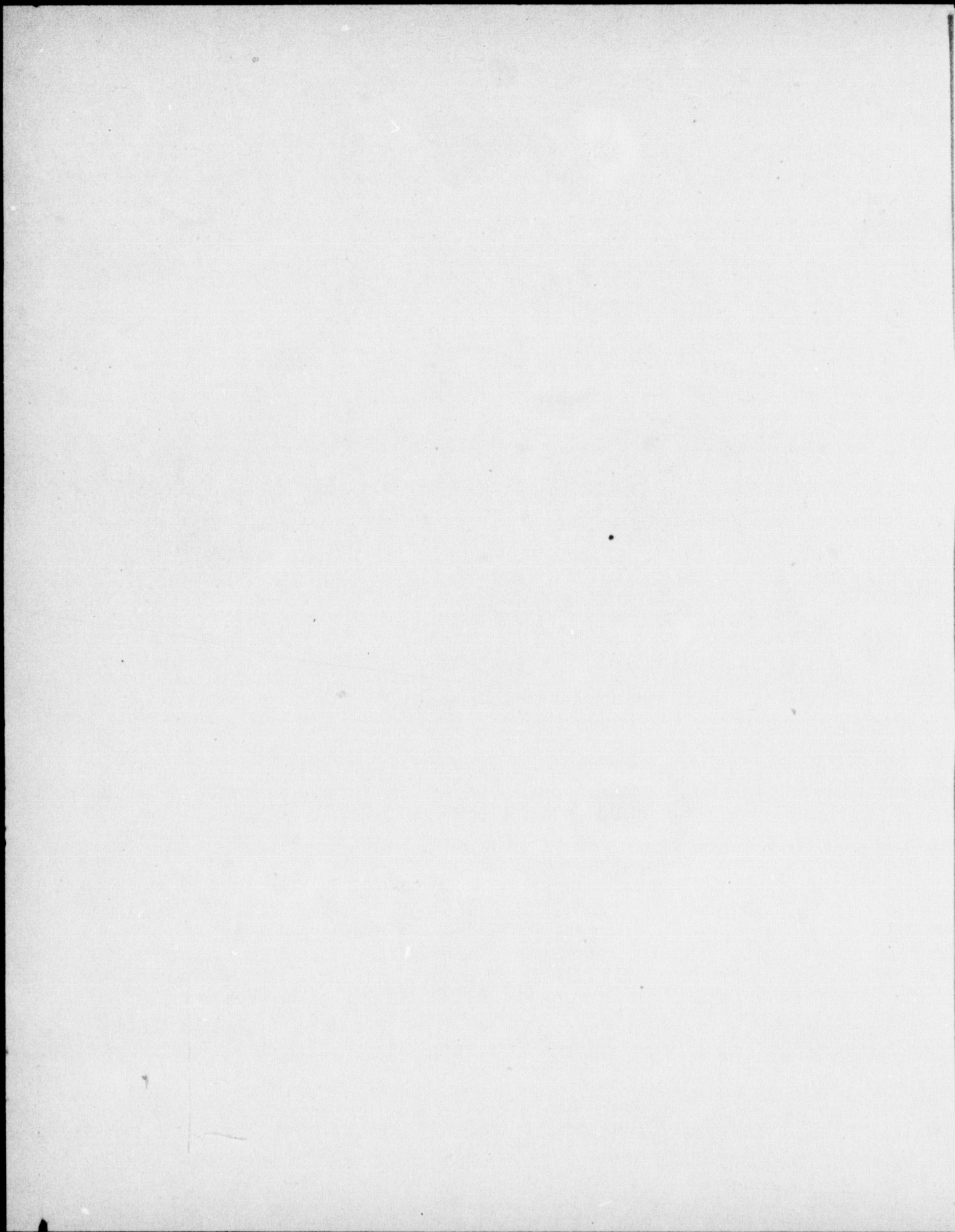
NOTICE OF APPEAL

Notice is hereby given that Nicholas D. Zinni, Defendant above-named, hereby appeals to the United States District Court of Appeals for the Second Circuit from his conviction and sentence on Counts I, II, and III, entered in this action on the 26th day of June, 1974.

Dated at Boston, Massachusetts this 3rd day of July, 1974.

THE DEFENDANT,
NICHOLAS D. ZINNI

BY: *C. Thomas Zinni*
C. Thomas Zinni, Esquire
53 Mount Vernon Street
Boston, Massachusetts 02108



C. Thomas Zinni

ATTORNEY AT LAW
53 MOUNT VERNON STREET
BOSTON, MASS.
02108

617-523 / 3245
3246

February 17, 1975

A. Daniel Fusaro, Clerk
United States Court of Appeals
for the Second Circuit
Foley Square
New York, New York 10007

Re: United States v. Nicholas D. Zinni et al--#74-2649
Re: United States v. Nicholas D. Zinni et al--#74-1941

Dear Sir:

Enclosed please find original and three copies of the appellant's brief and appendix in connection with both of the above-captioned matters.

I hereby certify that copies of the foregoing briefs and appendixes have been delivered in hand this day to Messrs. Paul E. Coffey, Hubert Santos, and James Wade; and copies of same have been mailed postage prepaid this day to Raymond Daniels, Esquire.

Very truly yours,

C. Thomas Zinni
C. Thomas Zinni

CTZ/s
Enclosures
cc: Paul E. Coffey, Esquire